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MODERN LAW REVIEW

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EDITORIAL NOTE

SUBSCRIBERS to the Modern Law Review must have been coming to the conclusion that we had ceased publication. This is by no means the case, but we feel that an explanation of the long delay since the last number appeared is necessary.

Owing to the various difficulties connected with the war we had got some three months behind the due date of publication. We accordingly determined to bring the review up to time by publishing a double number. This, however, involved us in difficulty owing to the paper ration, and further time was consumed in negotiations with our printers and the Paper Control before we reached a position to publish this number.

No sooner had this happened than part of the number was destroyed by enemy action, and publication was thereby seriously interfered with. We can only be thankful that the whole number was not destroyed.

As far as we can at present judge, and in the absence of any further cut in the paper ration, we should be able to publish the next volume in three parts of eighty pages each. We hope that this will enable us to reduce the subscription to its old rate of 12s. 6d. but we are not yet in a position to estimate the cost exactly. Further particulars will appear in the next number.

Meanwhile we take this opportunity to thank our subscribers for their continued support during an exceptionally difficult period.

R. S. T. CHORLEY,
for the Editorial Committee.

LIVERSIDGE *v.* ANDERSON

SOONER or later, the power of the Executive to intern British subjects without trial, and without specified cause, was bound to be tested before the House of Lords; and perhaps also it was inevitable that the judgment, once given, should provoke controversy and anxiety. That the controversy should have been initiated by a letter to the public Press by the Law Lord who delivered the leading majority judgment, and that it should purport to refute certain observations contained in the sole dissenting judgment, is a piquant, and to some legal minds, a regrettable innovation. Justice is questioned least when it preserves an Olympian aloofness, at once from the Executive and from the public. Nevertheless, in so far as it focused public attention upon the judgment itself, the letter performed a useful service.

The relation of the Judiciary to the Executive within a constitution such as ours, in which large areas are still governed rather by usages than by rules of law, is always a delicate one. In time of war it is not a matter for surprise that the Executive, in the interests of public safety, should seek to free wide classes of official acts from judicial control altogether. The question whether it actually has done so is at any particular time a question of law. The question whether it ought to do so is a question of policy. Courts of law are concerned only with the former problem. Questions of policy are ultimately for Parliament to determine. If, however, it should be that Parliament imagines that it has settled a question of policy by adopting a certain form of words, and the Courts then give to those words a meaning different from that which Parliament intended, the situation becomes difficult. It is one of the objects of this article to seek to discover whether such a confusion of purposes has arisen in *Liversidge* v. *Anderson*.

The question of the right of the Executive to arrest and imprison persons without trial has arisen in two forms at various stages of our constitutional history. It was first claimed as a prerogative right. In more recent times, it has been claimed under general powers delegated by Parliament to the Executive. As a prerogative right, it was regularly exercised by the Tudors, and was challenged in *The Case of the Five Knights* in 1627.[1] The Five Knights had refused to pay a forced loan, and were detained in the Fleet prison under a warrant of the Privy Council. They applied for writs of *habeas corpus*, to which the Warden of

[1] 3 State Trials 1.

the Fleet made a return that the prisoners were in his custody by virtue of a warrant of the Privy Council, stating that the prisoners were committed "with no particular cause of commitment but by special command of His Majesty" (*per speciale mandatum regis*). The Court held that although if a cause had been stated, it could examine whether it was sufficient, and free the prisoner if it was not, if no cause at all were stated, other than the King's special command, then the subject had no redress. Coke's great argument in this case had obviously impressed the judges, and as Mr. P. E. Roberts pointed out in his letter to *The Times* of 12th November, 1941, the Court was reluctant to hold in favour of the Crown, but the precedents were against the prisoners.

For all that, the Crown's victory was an empty one, for those imprisoned for non-payment of the loan were released on 2nd January, 1628, as a prelude to the summoning of Parliament by King Charles on the 30th of that month. As soon as Parliament met, Coke introduced a Bill to make it unlawful to detain any person in prison for more than three months without trial, and this initiated a debate on the liberty of the subject, in which issue between the Crown and the subject was fairly joined. The arguments advanced on both sides during that debate are worth perusing to-day, as they have remarkable relevance. The result was an emphatic reaffirmation of the right of the subject to be immune from detention, except after being charged with an offence according to law, and being found guilty of that offence. There is a similar reaffirmation in the Bill of Rights in 1689, and as Lord Shaw points out in his classic judgment in *R.* v. *Halliday: Ex parte Zadig*,[2] an Act of 1701 of the Scottish Parliament provided similar security for Scotsmen, who had no Magna Carta, no Petition or Bill of Rights, and no writ of *habeas corpus*.

For all that the principle had been so emphatically reaffirmed in these enactments, there were times of emergency when it was necessary to detain persons without trial. At such times, prior to the war of 1914–18, the appropriate procedure was by a statute suspending the *Habeas Corpus* Acts for a short time. One example is furnished by the Act 34 Geo. 3, c. 54, passed in 1794, "suspending" the *Habeas Corpus* Acts until 1st February, 1795. The virtue of this procedure was that when the limited period of its operation ended, the whole matter would have to be brought before Parliament anew. Even on the numerous occasions in the nineteenth century when the *Habeas Corpus* Acts were suspended in Ireland, there was always a Parliamentary

[2] (1917), A.C. 260.

debate and a vote. The effect of "suspension" was limited, for as Dicey points out, it would not deprive any person other than one within the purview of the Act of his ordinary rights. The only persons within the purview of the Act of 1794 (which was extended during the next seven years) were persons "that are or shall be in prison within the Kingdom of Great Britain at or upon the day on which this Act shall receive his Majesty's royal assent, or after, by warrant of his said Majesty's most honorable Privy Council, signed by six of the said Privy Council, for high treason, suspicion of high treason, or treasonable practices, or by warrant, signed by any of his Majesty's secretaries of state, for such causes as aforesaid."

Dicey[3] compares the effect of these Acts with a total repeal of *Habeas Corpus* Acts, and he points out that the suspensory Acts were at once narrower and wider. They are narrower because they affect the rights only of those imprisoned for causes specified in the Act. They are wider, because whilst the suspensory Acts are in operation, it is not possible for anyone to attack the detention of persons before any Court. If the *Habeas Corpus* Acts were repealed, every citizen would lose the protection of the *Habeas Corpus* statutes, "but since it would leave alive the now unquestionable authority of the judges to issue and compel obedience to a writ of *habeas corpus* at common law, it would not, assuming the bench to do their duty, increase the power of the Government to imprison persons suspected of treasonable practices, nor materially diminish the freedom of any class of Englishmen."[4]

Prior to the War of 1914–18, the *Habeas Corpus* Suspension Acts represented the most which had been attempted by the Executive in England since the days of Charles I, no matter how great the emergency. The troubled history of nineteenth-century Ireland, however, furnishes, in the Coercion Acts, what may very well have been the models for the powers taken by the Executive for Great Britain during the War of 1914–18 and the present war. Thus, the Coercion Act of 1881 provides—

"1. (1) Any person who is declared by warrant of the Lord Lieutenant to be reasonably suspected[5] of having at any time since the thirtieth day of September one thousand eight hundred and eighty been guilty as principal or accessory of high treason, treason felony, or treasonable practices, wherever committed, or of any crime punishable by law committed at any time since the thirtieth day of September one thousand eight hundred and

[3] Ninth Ed., p. 230.
[4] p. 229.
[5] *c.f.* the terms of Regulation 18B.

eighty in a prescribed district, being an act of violence or intimidation, or the inciting to an act of violence or intimidation, and tending to interfere with or disturb the maintenance of law and order, may be arrested in any part of Ireland and legally detained during the continuance of this Act in such prison in Ireland as may from time to time be directed by the Lord Lieutenant, without bail or mainprize; and shall not be discharged or tried by any court without the direction of the Lord Lieutenant; and every such warrant shall for the purposes of this Act, be conclusive evidence of all matters therein contained, and of the jurisdiction to issue and execute such warrant, and of the legality of the arrest and detention of the person mentioned in such warrant."

It will be observed that the concluding clauses of this subsection establish the position which now exists under Regulation 18B since the decision of the House of Lords in *Liversidge* v. *Anderson*, but it is obvious that the Coercion Act is much more concerned with legal forms than the regulations either during the War of 1914–18 or during the present war, and Subsection (2) of the same section provides that every warrant shall state the character of the crime of which the arrested person is suspected, and also provides that a copy of the warrant shall be given to the person arrested on the occasion of his arrest. Further, all cases of persons arrested under this Act must be reconsidered at three months intervals.

The steady growth in the power of the Executive in the half century prior to the outbreak of the first World War was no doubt responsible for the form which the curtailments of the liberty of the subject then took, for they were no longer achieved by the method of *Habeas Corpus* Suspension Acts, which Blackstone had regarded as the only proper way of proceeding in a national emergency, but by way of a general delegation of power to the Executive under the Defence of the Realm Acts, not for a limited period as the older Acts had done, but for the duration of the war. Thus, a blank cheque was given to the Government of the day, subject to Parliamentary scrutiny; but such scrutiny, by a Parliament which, then as now, had been elected some years before the war, and which could not be dissolved whilst the war was in progress, could scarcely be regarded as effective control. In the recent debates in Parliament upon Regulation 18B, as in the debates upon Regulation 14B in the last war, the Government has fallen back upon two contradictory arguments: (1) These powers have been delegated in their wide form to the Executive by Parliament, so the Executive cannot be blamed if

it takes advantage of their amplitude; (2) the powers are not really arbitrary, because Parliament controls their exercise. Both arguments cannot be right, and they conceal the fact that for the period of the war, our traditional liberties, dating from Magna Carta, have been swept aside, and we have become a "police state."

The first three Defence of the Realm Acts passed in the last war all reflected a triumphant Executive's desire to dispense completely with ordinary legal safeguards. The first two Acts, of 8th August and 28th August, 1914, provided that "His Majesty in Council has power to issue regulations as to the powers and duties of the Admiralty and Army Council, and of members of H.M. Forces and other persons acting on his behalf, for securing the public safety and the defence of the realm; and may by such regulations authorise the trial by courts-martial and punishment of persons contravening any of the provisions of such regulations."

These two Acts therefore only declared that the Crown had power to issue regulations upon the existing powers and duties of the Admiralty and Army Council. It was not in this sense that the Acts were interpreted by the Executive which forthwith made regulations directing arrests without warrant, the entry upon land or buildings, and even for the destruction of private property. These were declared *ultra vires* by the Courts, whereupon a third Act, of 27th November, 1914, was passed, giving the Crown power to issue regulations "for securing the public safety and defence of the realm and as to the powers and duties for that purpose of the Admiralty, etc." Once again provision was made for trial by courts-martial, except that minor offences could be dealt with by courts of summary jurisdiction. In this way, the Executive had obtained a general power to make regulations for the public safety and defence of the realm, and the court-martial had been made the normal way of procedure in respect of all serious breaches of them. Public opinion had viewed these developments with serious anxiety, however, and eminent lawyers of such differing opinions as Lords Halsbury, Haldane, Bryce, Loreburn, and Parmoor had united in the House of Lords to condemn them. The result was that a further Act, of 16th March, 1915, was passed, restoring the right of a British subject, charged with an offence under the Regulations, to trial by jury.

Under Regulation 14B, however, persons could be detained without being brought to trial at all. It ran: "Where on the recommendation of a competent naval or military authority or

of one of the advisory committees hereinbefore mentioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinbefore mentioned, the Secretary of State may by order require that person . . . to be interned."

Zadig, a naturalised British subject of German origin, was interned under the Regulation, and applied for a writ of *habeas corpus*. The only ground on which Zadig could succeed was that the regulation was *ultra vires*. The Lord Chancellor (Lord Finlay), Lords Dunedin, Atkinson and Wrenbury, thought that the Regulation was not *ultra vires*. Lord Shaw, the only dissentient, thought that it was. The real issue in the trial was whether the Defence of the Realm Acts had conferred an unlimited power upon the Executive, or whether there were limits. For the appellant it was argued that the Act contained a limitation, since it had provided machinery for the trial of persons committing offences against the Regulations. There were no express words concerning detention without trial in the Act, and a procedure so utterly at variance with the English constitution ought not to be read into the Act by implication.

The substance of Lord Finlay's judgment was that the Act authorised provisions of two kinds—for prevention and for punishment. Persons who infringe the Regulations are to be punished. Persons against whom preventive measures are taken are to be detained. "Any preventive measures, even if they involve some restraint (says Lord Finlay) or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State." This distinction may appear highly academic to a person who has been "detained" without trial, and as Lord Shaw pointed out in his famous judgment, it accords ill with Blackstone's observation that "the confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment." This, incidentally, is the basis of the test of false imprisonment.

Lord Atkinson's judgment contains some curious misconceptions concerning the effect of the Defence of the Realm Act. After observing that several topics to which the appellant's counsel had addressed themselves were interesting historically, but had little relevancy, he cites a statute of 1360 relating to the powers of justices of the peace to take up persons of ill-fame,

and to compel them to find sufficient surety for their good behaviour. He then delivers himself of the following curious proposition—

"If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires*, do not infringe upon the *Habeas Corpus* Acts in any way whatever, or take away any rights conferred by Magna Carta, for the simple reason that the Act and these orders become part of the law of the land. If it were otherwise, then every statute and every *intra vires* rule or by-law having the force of law, creating a new offence for which imprisonment could be inflicted, would amount *pro tanto* to a repeal of the *Habeas Corpus* Acts or Magna Carta."

Upon this it is sufficient to observe: (1) That the main complaint in Zadig's case was that he was interned without any offence at all being disclosed; and (2) that obviously a statute or a by-law creating a new offence does not in any way infringe Magna Carta or the *Habeas Corpus* Acts, since persons accused of such new offences are brought to trial before the Courts—a procedure which it is the purpose of Magna Carta, the *Habeas Corpus* Acts and many other constitutional enactments to uphold, and which Regulation 14B had flagrantly transgressed.

Lord Shaw's very full judgment in this case deals adequately with the constitutional points involved, and some of his observations have become frequently quoted expositions of constitutional doctrine. Fundamentally, he rejected the view that the Defence of the Realm Act could be so construed as to remove constitutional rights by implication, and the following extract from *Maxwell on the Interpretation of Statutes*,[6] which he cites in his judgment, appears conclusive—

"Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

Although Lord Shaw's view did not prevail, the general consensus of opinion on constitutional law since *R.* v. *Halliday* has

[6] Fifth Ed., p. 268.

been in favour of the assumption that his view more accurately represented the position than that of the majority, and as Mr. F. W. Hirst (one of the counsel for the appellant Zadig) pointed out in a letter to *The Times* of 12th November, after the writ of *habeas corpus* had been refused by the House of Lords, Zadig was liberated almost immediately.

It has been sought to set out above the constitutional background of *Liversidge* v. *Anderson*.[7] By the beginning of the present war, the power of the Executive had advanced still further, and there was no longer any question whether the appropriate method for the curtailment of the liberties of the subject was by a *Habeas Corpus* Suspension Act or by departmental regulation. The only question was how widely the Act authorising the regulations should be drawn. The answer is furnished by the terms of Section 1 of the Emergency Powers (Defence) Act, 1939, which provides that the King may, by Order in Council, make such regulations "as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order and the efficient prosecution of any war in which his Majesty may be engaged, and for maintaining supplies and services essential to the life of the community," and to avoid the difficulties which were raised in *R.* v. *Halliday*. Subsection (2) provides that the Defence Regulations may include regulations "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the Realm."

Armed with this wide authority, the Executive advanced a step further, and prepared regulations, of which Regulation 18B was drafted in terms which would have given the Home Secretary authority to intern persons entirely at his discretion. The wide terms of the regulation aroused anxiety, both in Parliament and among the general public, with the result that this regulation was withdrawn, and was submitted in amended form, so that it ran: "If the Secretary of State has reasonable cause to believe" that a person is of hostile associations, and it is necessary to exercise control over him, then the Home Secretary may make an order for his detention. In *Liversidge* v. *Anderson*, Mr. Liversidge issued a writ against the Home Secretary, claiming a declaration that his detention was unlawful, and claiming damages for false imprisonment. The defence admitted the detention under Regulation 18B, and Mr. Liversidge thereupon took out a summons before the Master, asking for an order that the Home Secretary should give particulars (*a*) of the grounds on which the

[7] (1942), 110 L.J.K.B. 724.

first defendant (Sir John Anderson) had reason to believe Mr. Liversidge to be a person of hostile associations, and (*b*) of the grounds on which he had reasonable cause to believe that, by reason of such associations, it was necessary to exercise control over him. The Master refused to order the defendant to deliver these particulars, and Tucker, J., the Court of Appeal, and finally the House of Lords, upheld this refusal. The net result of the decision is that the safeguards which the House thought it had imposed when the original draft regulation was withdrawn have proved entirely illusory, and the discretion of the Home Secretary becomes free from any legal fetter.

On the narrow point of construction, the operative part of Lord Maugham's judgment (which represented the views of the majority) is contained in the following paragraph—

"In the absence of a context the *prima facie* meaning of such a phrase as 'if A. B. has reasonable cause to believe' a certain thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if A. B. believes it. But I am quite unable to take the view that the words could only have that meaning. It seems reasonably clear that if the thing to be believed is something within the knowledge of A. B., or one for the exercise of his exclusive discretion, the words might well mean if A. B. acting on what he thought was reasonable cause (and of course acting in good faith) believed the thing in question."

To this proposition, Lord Atkin in his dissenting judgment replied—

"It was surely incapable of dispute that the words 'If A has X' constituted a condition the essence of which was the existence of X and the having of it by A. The words did not and could not mean 'If A thinks that he has.' 'Reasonable cause' for an action or a belief was just as much a positive fact capable of determination by a third party as was a broken ankle or a legal right. That meaning of the words had been accepted in innumerable legal decisions for many generations; 'reasonable cause' for a belief when the subject of legal dispute had been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal."

Other grounds for the decision of Lord Maugham and the majority were obviously administrative rather than legal—for example, the consideration that the Minister would be acting on information of a highly confidential character, which could not be disclosed to the person detained or to the Court without the gravest risk of prejudicing the activities of the Home Office. One

might have thought that if the proceedings in Court were *in camera* (as they usually are in treason trials in war time) that counsel and officers of the Court were at least as capable of protecting the State's vital interests as Civil Servants employed by the Home Office; but altogether apart from this, as Lord Atkin pointed out, there was no question of substituting the decision of the Judge for that of the Minister. "A Judge had the duty to say whether the conditions of the power of detention were fulfilled. If there were reasonable grounds, the Judge had no further duty of deciding whether he would have formed the same belief, any more than, if there was reasonable evidence to go to a jury, the Judge was concerned with whether he would have come to the same verdict. It was further argued that the grounds of belief might be confidential matters of public importance, and that it was impossible to suppose that the Secretary of State was intended to disclose either his grounds or his information to the Court. The objection was answered by the very terms of the Regulation itself, in its provisions that the detained person had the right to make objections to the advisory committee, and that the chairman must inform the objector of the grounds on which the order had been made against him."

It was argued in a leading article in *The Times* of 4th November, commenting on the decision of the House of Lords, that a real check on the Home Secretary's discretion existed in the advisory committee, but as Sir Irving Albery, M.P., pointed out in a letter the following morning, although the chairman of this committee is a distinguished lawyer, in over a hundred cases the decision of the Home Secretary has been contrary to the advice of the committee, and in reaching these decisions, the Home Secretary has stated in the House of Commons that he has not been influenced by additional information, available to himself but not to the committee. He has simply reached a contrary decision on a different judgment of the same facts. This establishes beyond all possible doubt that the grounds of internment are purely administrative, and that the procedure is not even quasi-judicial.

It is one of the happier features of this controversy that there is no suggestion that the Home Secretary *has* used his powers oppressively, in this, or in other cases. Indeed, the present Home Secretary's tenure of office has coincided with a liberal policy in a time of extreme difficulty and national danger—a policy upon which it will be possible to look back with satisfaction when the war is over. The issue, therefore, is essentially one of general principle, and public anxiety has been aroused, not by any specific

act, but by the abdication of the judiciary from all control of the Executive in matters vitally affecting the liberty of the subject. It may be recalled that when the odious Defence of the Realm Acts, and the regulations thereunder, were repealed after the last war, the Government found it expedient to pass the Emergency Powers Act, 1920, designed to give the Executive very wide powers to deal with civil disorder, but Section 2 (3) of that Act explicitly provides "that no such regulations (as the Executive may enact) shall alter any existing procedure in civil cases, or confer any right to punish by fine or imprisonment without trial." It would seem, therefore, that it is impossible to intern under any counterpart to Regulation 18B under the Emergency Powers Act, and in this way the Rule of Law received re-affirmation when the last war was concluded. Those who have greeted Lord Atkin's judgment with warm approval are not unaware of the urgent necessity for vigorous Executive action in the interests of national safety in a war such as is at present being waged, but they are also aware that "appetite grows with that it feeds upon," and they would see in even the limited check which Lord Atkin's interpretation of Regulation 18B would impose upon the Executive a reassertion of a principle for which a number of Englishmen in recent years have rather strangely lost their enthusiasm.

G. W. KEETON.

Postscript

Liversidge v. *Anderson* was followed by the House of Lords in *Greene* v. *Secretary of State for Home Affairs* (1942), 111 L.J.K.B. 24. In this extraordinary case, an error in the order made against Mr. Greene enabled the Court, in hearing his application for a writ of *habeas corpus*, to find the writ bad, and so enable Mr. Greene for the first time to obtain from the Home Office the name of the person on whose statement he was detained. When this person was interviewed, he completely denied the charges he was alleged to have made; whereupon, and in spite of the decision of the House of Lords upon a fresh application for a writ of *habeas corpus* (after Mr. Greene had been detained afresh), Mr. Greene was released. As Mr. Liversidge has also been released, the victory for the executive in these two cases seems to be as empty as the victories of the executive in the *Case of the Five Knights* and in *Zadig's Case*.

In spite of these considerations, these judgments would appear to commend themselves to Sir William Holdsworth and to the Editor of the *Law Quarterly*. The former (58 L.Q.R. 1–3) takes the broad ground that in these cases there is no triable issue at all

—an attitude which is comprehensible only on the hypothesis that under these Acts the judiciary abdicates completely in favour of the executive. If this is the position, then the distinction between our present constitution and that of any Continental "police state" is reduced to vanishing point. Professor Goodhart's argument is a subtle one. He declares that the propositions: "If A has a broken ankle," and "if A thinks he has a broken ankle,' the distinction between which was the basis of Lord Atkin's judgment, are really identical. All statements of fact, he suggests, are really only statements of someone's opinion on those facts. "If A falls and says 'I have a broken ankle,' this means 'I think I have a broken ankle.' Later, when the doctor examines A's leg, and then says 'A has a broken ankle," this again means 'I think A has a broken ankle.' In both cases the statement of fact is only a statement of opinion. We must confess that we are quite unable to follow this reasoning. An ankle is broken, not because A or B or anyone else thinks it is, but because certain objective facts exist from which a fracture is the only possible deduction—or does Professor Goodhart go further, and suggest that there are no such things as facts—only opinions? If Professor Goodhart's explanation is correct, what are we to make of the definition of fraud, which declares it to be a misrepresentation of *fact*, and then goes on to explain that a misrepresentation of opinion is not actionable?

INVESTOR PROTECTION BY ADMINISTRATIVE AGENCY: THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

PRIOR to 1933, the law of the United States, like the law of England, left the problem of investor protection almost entirely to private litigation, in which the courts applied doctrines of common law fraud and of the equitable duties of fiduciaries to such cases as were brought before them. There had been, it is true, a few experiments in the direction of regulation by administrative bodies. Administrative supervision of certain public utilities, such as electric power and light companies, which was originally confined to regulation of rates and services, had by 1933 been extended in most of the states so as to include some measure of control over security issues by such utilities. In 1920 the Federal Interstate Commerce Commission had been given similar powers with respect to security issues by interstate railroads. The practice of empowering a state commission to deny licences to sell securities if either the terms of the issue or the representations in the prospectus are found to be fraudulent, a practice which began in the Middle West about thirty years ago, gradually spread to most parts of the country.[1]

These administrative controls were on the whole relatively unimportant. Control over railroad and public utility company securities concerned one segment only of the corporate field and was limited to operating-company, as distinct from holding-company, securities. The licensing Acts were so phrased and so administered that, generally speaking, they affected only palpably fraudulent promotional securities. In New York, our largest securities market, there was no administrative control whatever except in the case of public utility issues.[2] The need for supplying investors with adequate information about non-fraudulent issues was not met at all in any state, since we had in the United States nothing comparable to the prospectus requirements of the English Companies Act.

[1] These licensing statutes are commonly known as blue-sky laws because they are designed to prevent the sale of corporate securities which represent assets no more substantial than the blue sky.

[2] A New York statute requires that notice of proposed new issues be given to the attorney general of the state, who is authorised to institute injunction proceedings in cases of suspected fraud. *New York General Business Law*, art. 23—A.

The Securities Act

The tremendous losses suffered by investors during the years 1930-1932 led to an insistent demand for federal legislation, and one of the major initial objectives of the Roosevelt administration was the enactment of legislation for the protection of purchasers of securities. A statute designed to afford such protection, known as the Securities Act of 1933, was enacted in May of that year.[3] The Act was modelled to some extent on the English Companies Act, and, like that Act, required that new issues of securities be accompanied by a statutory form of prospectus. But, unlike the Companies Act, the Securities Act relied largely for its effective enforcement on the powers granted to an administrative agency. In the original Act these powers were conferred on an already existing administrative body, the Federal Trade Commission, but when, a year later, the Securities and Exchange Commission was created for the purpose of administering another statute, the duties of the Federal Trade Commission relating to the enforcement of the Securities Act were transferred to the new commission.

The general scheme of the Act is a simple one. The use of the mails and the instrumentalities of interstate commerce are denied to the distributors of a newly-created security[4] unless and until the issuer of the security has filed with the Commission a registration statement which contains all of the information which is required to be included in the prospectus.[5] If the Commission finds, after a hearing, that the information contained in the registration statement fails to comply with the statutory standard in that it is false, misleading or incomplete,[6] it is its

[3] Act of May 27, 1933, c. 38, Title I, as amended by Act of June 6, 1934, c. 404, 15 *United States Code Ann.* §§ 77*a et seq.*

[4] The Act exempts certain securities, including securities issued by railroad companies, which are regulated by another commission, and certain transactions, including issues which do not involve any public offering, from the registration requirements. The Commission is authorised, subject to such terms and conditions as it may prescribe, to exempt issues of not over $100,000 in amount. It has availed itself of this power to exempt such issues from registration, requiring instead the filing of a brief letter of notification.

[5] The prospectus need not include copies of certain documents which must be attached to the registration statement. It must, however, contain considerably more information than is required for prospectuses issued in conformity with the English Companies Act.

[6] If the registration statement contains falsehoods or misleading omissions which the Commission fails to detect and securities are issued on the basis of such a statement, a purchaser who suffers loss as a result has a cause of action against various persons, including the issuer, its directors and its underwriters. Section 11, 15 *U.S. Code Ann.* § 77*k*. (The sections of the Securities Act and of the other acts referred to herein are commonly designated by American lawyers by the numbers given to them by the original act, rather than by the numbers and letters which are given to them in the United States Code. The footnotes to this article will refer to such sections by both numbers.)

duty to issue a stop order which will, unless and until it is reversed by the courts, have the effect of making the further distribution of the security unlawful.

In order to enable it to perform its duties effectively, the Commission has established a registration division staffed by a large corps of security analysts, accountants, attorneys, and engineers. Most defects in registration statements are non-fraudulent in character, and it is desirable that a way be found for curing such defects without subjecting issuers to the unfavourable publicity of stop-order proceedings. For this reason the Commission has adopted the plan of sending the issuer a deficiency letter in cases in which it believes that a filed statement is defective, the purpose of the letter being to point out the alleged defects and insist that they be corrected. A conference with the issuer's representatives usually follows, and no stop-order proceeding is instituted unless the issuer refuses to accept the Commission's changes or unless the Commission believes that the misrepresentations in the original statement were made with fraudulent motives.[7]

As a result of this practice, the Commission's published opinions, which are written in those cases only in which stop orders are issued, give an imperfect picture of the extent to which registration statements and prospectuses are in fact being modified as a result of action by the Commission. It is nevertheless possible to derive from those opinions and from other available data, including the information which is contained in the Commission's annual reports, a fairly adequate understanding of the impact of the Commission's activities.

The Commission has proceeded with caution in prescribing rigid rules of corporate accounting, but has from the beginning insisted that balance sheets and income statements included in registration statements shall be in conformity with standards approved by reputable accountants. More recently, it has adopted a series of rules, applicable to all financial statements which are required by the Securities Act and by the Securities Exchange Act, which, while permitting a good deal of flexibility, nevertheless prescribe in considerable detail the proper accounting

[7] For descriptions of the organisation of the Commission's Registration Division and of its procedural methods, see MacChesney, "The Securities Act and the Promoter," 25 *California L. Rev.* 66 (1936); Johnson and Jackson, "The Securities and Exchange Commission: Its Organisation and Functions under the Securities Act of 1933," 4 *Law and Contemporary Problems* 3 (1937).

For an illuminating study of the Commission's procedural methods in administering the Securities Act, the Securities Exchange Act, and the Public Utility Holding Company Act, see *Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Part* 13, *Securities and Exchange Commission* (1941).

treatment of various items to be included in such statements. The application of the Commission's standards has resulted in many cases in radical reduction in the valuation of assets and corresponding reduction in the number of shares allotted to promoters as the purchase price for such assets.[8] Outside the field of accounting, the Commission has insisted on frank disclosure of unfavourable factors which are likely to affect the success of the enterprise.

Although there has been some complaint of the expense incurred by preparing the rather elaborate data required by the Act and by the Commission's rulings, it is only in the case of the smaller issues that the expense, measured in terms of a percentage of the total amount of money obtained through flotation of the issue, is a serious one. It has been suggested that the present maximum limit of $100,000 for exempt issues might be raised, but Congress is at present concerned with more urgent matters.

The Commission's administration of the stop-order provision of the statute led in one instance to the only serious controversy which the Commission has had with the courts. The Commission believed that it had authority under the Act to refuse to permit an issuer, the correctness of whose registration statement had been challenged, to withdraw the statement and thus terminate the stop-order proceedings. The Commission took the position that it was desirable, in cases in which the Commission believed that errors in a registration statement were deliberate, to complete the proceedings and publish its findings regardless of the fact that the registrant was willing to abandon its attempt to market the securities. In *Jones* v. *Securities and Exchange Commission*,[9] the Supreme Court, speaking through Mr. Justice Sutherland, not only held that the Commission's action was beyond its statutory powers but excoriated that action as an odious practice reminiscent of the Star Chamber. Mr. Justice Cardozo, dissenting, pointed out that the Commission had no power to impose any penalty on Mr. Jones except publicity and, referring to the

[8] For a striking illustration of this effect of the Commission's action, see *In the Matter of Haddam Distillers Corporation*, 1 S.E.C. Reports 37 (1934). As a result of stop-order proceedings, the valuation of the fixed assets on the balance sheet of a newly organised distilling company was reduced from $312,090.00 to $104,096.02, and the par value of the shares issued to the promoters was reduced from $250,000 to $101,500.

[9] *Jones* v. *Securities and Exchange Commission*, 298 U.S. 1, 56 Sup. Ct. 654, 80 L.Ed. 1015 (1936).

The Commission has, in general, been remarkably successful in the courts. During the fiscal year ended June 30, 1939, it instituted 69 suits to enjoin violations of statutes and, with one exception, was successful in every injunctive action prosecuted and disposed of during that fiscal year. See *Administrative Procedure in Government Agencies*, footnote 7 *supra*, at p. 6.

alleged Star Chamber analogy, remarked that "historians may find hyperbole in the sanguinary simile."

The Securities Exchange Act

The Securities Exchange Act,[10] which became law one year and ten days after the enactment of the Securities Act, created the Securities and Exchange Commission,[11] transferred the duty of administering the Securities Act to it, and also entrusted to it the further duty of administering the new Act, which is concerned with the regulation of stock exchanges, stock brokers, and corporations [companies][12] whose shares are traded in on such exchanges. That part of the Act which deals with stock exchanges and stock brokers is subdivided into regulation of the use of credit in stock market transactions, a matter which is entrusted to the Federal Reserve Board, and regulation of stock exchanges, of transactions thereon, and of brokers and dealers who operate either on such exchanges or in the so-called "over-the-counter" market, matters which are entrusted to the Securities and Exchange Commission.

All of the major stock or security exchanges are required to register with the Commission. Various manipulative practices which tend, if permitted, to make a stock exchange more like a fraudulently managed gambling casino than a free market are forbidden by the Act. In this connection the Commission's function is in part one of detection and suppression. In order that it may discover such practices, it employs a staff of trained specialists who make systematic observations of movements in the price and volume of all securities. As a result of information derived in this manner and from other sources, it conducts investigations of situations which appear to involve market manipulation. When wrongdoing has been uncovered, the Commission deals with it, according to the exigencies of the case, by demanding that the exchange adopt disciplinary measures if the offender is an exchange member, by itself instituting injunction proceedings or revoking the offender's registration as a

[10] Act of June 6, 1934, c. 404, Title I, as amended by Act of May 27, 1936, 15 *U.S. Code Ann.* §§ 78*a et seq.*

[11] The first Chairman of the Commission was Mr. Joseph P. Kennedy, subsequently Ambassador of the United States to the Court of St. James. He was succeeded in turn by Mr. James M. Landis, now Dean of the Harvard Law School, Mr. William O. Douglas, now Justice of the Supreme Court of the United States, Mr. Jerome N. Frank, now Judge of the United States Circuit Court of Appeals, and Mr. Edward C. Eicher.

[12] Here and elsewhere in this article, an attempt will be made by the use of brackets to indicate the nearest English equivalent to some American business or legal term.

broker or dealer,[13] and, in flagrant cases, by turning over its information to the Department of Justice with a view to criminal prosecution.[14] The Commission is empowered to define manipulative and deceptive devices as well as to take measures to discover and prevent their use.[15] Pursuant to this authorisation, it has adopted a number of important interpretative rules.

In addition to those practices which are forbidden by the Act, there are a number of other practices which are only to be permitted subject to such rules as the Commission may prescribe. The Commission has adopted the wise policy of declining to adopt restrictive rules until it has thoroughly investigated a problem and has given those whose activities would be affected by a proposed rule ample opportunity to express their views.

The Act authorises the Commission to request exchanges to modify their rules and practices and, in case the exchange fails to comply with such request, to enforce the request by an order which, like other orders of the Commission, is subject to judicial review.[16] The Commission has succeeded in inducing our principal exchange, the New York Stock Exchange, to effect not only a radical revision of its rules but to make far-reaching changes in its constitution and organisation.[17]

Regulation of exchanges and exchange transactions would be inadequate as a protection for investors unless investors were able to obtain the fullest practicable amount of information with respect to the business success and financial condition of corporations whose securities are dealt with on the exchanges. The Act accordingly makes it unlawful for any member, broker, or dealer to effect any transaction in any security on a national securities exchange unless the security is registered. In order to obtain registration, the issuing corporation must file an application containing certain information. The content of the application is indicated in broad outlines by the statute, but the Commission is instructed to supplement the statutory provisions by regulations.[18] The issuer is further required to file with the exchange and with the Commission such annual reports as the Commission may prescribe.[19] In exercising the latter power, the Commission has adopted a regulation which requires that annual

[13] Brokers and dealers who operate in whole or in part in the over-the-counter market are required to register with the Commission.

[14] See *Fourth Annual Report of the Securities and Exchange Commission* (1938), p. 82.

[15] Sections 10 and 15, 15 *U.S. Code Ann.* §§ 78*j*, 78*o*.

[16] Section 19, 15 *U.S. Code Ann.* § 78*s*.

[17] See *Fourth Annual Report of the Securities and Exchange Commission* (1938), p. 20.

[18] Section 12, 15 *U.S. Code Ann.* § 78*l*.

[19] Section 13, 15 *U.S. Code Ann.* § 78*m*.

reports contain information concerning the persons who control or direct the enterprise, its business activities, its assets and income, and the remuneration of its directors and principal officers. Congress unfortunately failed to authorise the Commission to require that all or any portion of such annual reports should be sent to the corporation's shareholders.

The Act provides that any person filing an application, report, or document may object in writing to the public disclosure of the information which it contains, in which event the Commission shall not make the information available to the public unless it finds that its disclosure is in the public interest.[20] The Commission has passed upon a large number of such applications and has granted about half of them.

Misstatements in reports filed pursuant to the Securities and Exchange Act were the basis of the astounding McKesson & Robbins case,[21] in which an investigation conducted by the Commission after the company had gone into receivership disclosed the fact that the company's crude drug department, which was supposed to have inventories and accounts receivable amounting to some $20,000,000, was a figment of its president's imagination. The Commission thereupon conducted a hearing to determine the character of the audit which had been made by Price, Waterhouse & Co., and the adequacy of the safeguards which are provided by generally accepted auditing practices. This hearing led to the publication by the Commission of a report recommending certain changes in auditing procedure and the election of accountants by shareholders.[22] The Commission later amended its accounting rules so as to require that the accountant's certificate indicate the accounting procedures which have been followed in making the audit.

In addition to regulating security markets and prescribing the information which is to be supplied to such markets, the Act contains a number of regulatory provisions concerning the activities of corporations whose securities are listed on a national securities exchange. The most important of these, at least with respect to the powers conferred on the Commission, is a provision which makes it unlawful to solicit any proxy relating to a security registered on a national securities exchange except in accordance

[20] The Commission is given similar powers with respect to information filed pursuant to the Securities Act, Sections 6 and 7, 15 *U.S. Code Ann.* §§ 77*f*, 77*g*, and the Public Utility Holding Company Act, Section 22, 15 *U.S. Code Ann.* § 79*v*.

[21] See *Sixth Annual Report of Securities and Exchange Commission* (1940), p. 164.

[22] Unlike the English Companies Act, most American corporation laws make no provision for an official company auditor but leave the directors free to employ such accountants as they choose.

with rules prescribed by the Commission.[23] Similar powers with respect to the securities of corporations which are subject to those Acts are conferred on the Commission by the Public Utility Holding Company Act[24] and by the Investment Company Act.[25] Pursuant to such authority, the Commission has adopted Proxy Rule X—14A—8. The rule is subdivided into provisions which are applicable, respectively, to proxies which relate to elections of directors or officers, to plans for their remuneration, to acquisitions of property, to restatements of assets, capital or surplus accounts, to corporate reports and certain other matters, to authorisation of the issue of securities, to modifications of rights of existing security holders, and to mergers or consolidations [amalgamations]. The rule prescribes the kind of information which must be given security holders in each of these cases. This information, in the case of proxies of the last three types, must include adequate financial statements. In view of the wide use of the proxy system of voting by American corporations and of the previous practice of the managers of many such corporations, when soliciting proxies which confer wide powers on the proxy holder, to give out little or no information either as to the proposals for which or the candidates for whom the proxy is to be voted, these proxy rules constitute an important reform in American corporate procedure.

The Public Utility Holding Company Act

The rapid expansion of the gas and electric utility industry during the period 1900 1930 led to the combination of many of the local operating companies through the medium of holding companies. In order to facilitate the control of vast properties by means of a limited amount of investment, holding company was piled on holding company and many individual companies were given complicated security structures composed partly of bonds, partly of preferred shares, and partly of common shares, with voting control vested in the holders of the common shares. The largest of these holding companies, the Electric Bond & Share Co., Ltd., had, at the height of its power in 1930, nearly four billion dollars worth of assets and over a hundred subsidiaries, sub-subsidiaries and sub-subsubsidiaries,[26] whose operating properties were scattered all over the United States from the Atlantic to the Pacific.[27]

[23] Section 14, 15 *U.S. Code Ann.* § 78*n*.
[24] Section 13, 15 *U.S. Code Ann.* § 79*l*.
[25] Section 20, 15 *U.S. Code Ann.* § 80*a*–20.
[26] Bonbright, *The Public Utility Holding Company* (1932), p. 105.
[27] Several of the subsidiaries operated in Latin American countries.

The development of the holding company contributed to the rapid expansion of the industry by facilitating the raising of capital and by supplying the operating companies with the services of able engineers. It led, however, to a variety of abuses. The operating subsidiaries of the holding companies were subjected to more or less stringent regulation with respect to rates, services, and financial practices by the utility commissions of the several states; but these commissions had, in general, no control whatever over the holding companies. Many of the holding company systems were built up during the boom years 1921–1929 and were heavily overcapitalised. The need to pay interest and dividends on excessive quantities of bonds and shares, together with the desire of the owners of the common shares of the top holding company to earn large profits on their shares, led many of the holding companies, especially when earnings turned downward after 1929, to indulge in various objectionable practices by which the operating companies were "milked" for the benefit of the holding companies.

Federal regulation of interstate public utility holding companies in the interest of both consumers and investors was from the beginning one of the major objectives of the Roosevelt administration. The subject was, however, a complicated and highly controversial one, and the administration's reform program was not enacted into law until 1935, in which year it took shape as the Public Utility Holding Company Act. This statute provides for the registration of interstate public utility holding companies and subjects registered companies to two types of regulation. The first type, provided for by Section 11 of the Act,[28] is designed to transform complicated holding company systems with geographically scattered properties into financially simplified systems with voting power equitably distributed among the investors. The other sections of the Act provide for the regulation of the financial practices of holding companies and their subsidiaries.[29]

Partly because the constitutionality of the entire statute remained in doubt until the decision of the United States Supreme Court in *Electric Bond & Share Co.* v. *Securities and Exchange Commission* in 1938,[30] and partly because of the complexity of the problem, it is only within the last year that much progress has been made in carrying out the objectives of Section 11. That section contains two separate, though interrelated, provisions. Geographical integration of physical properties is to take

[28] 15 *U.S Code Ann.* § 79*k*.

[29] The regulation of the rates charged and services rendered was left by the Act where it had been theretofore—in the hands of the state commissions.

[30] 303 U.S. 419, 58 Sup. Ct. 678, 82 L. Ed. 936 (1938).

the place of what a former Chairman of the Commission, the present Mr. Justice Douglas, was accustomed to characterise as "scatteration."[31] In addition, the corporate structure of the more highly complicated holding company systems is to be simplified and inequitable distribution of voting power eliminated by requiring, in some cases, the elimination of certain companies from the system so as to reduce the number of tiers in the corporate pyramid and, in other cases, the simplification of the capital structure of individual companies within the system.

The desire to bring about the transformation of sprawling utility empires into more compact units was motivated by scepticism as to the economic advantages of size when unaccompanied by physical integration of properties and by the belief that management which is far removed in its habitat from the communities which it serves tends to be inefficient and unresponsive to local needs. It was due also to acceptance of the broader generalisation, characteristic of the New Deal, that the enormous economic power which gigantic size creates is socially undesirable and is tolerable only where its economic advantages are indubitable.[32] In order to implement the policies which these beliefs connote, the Securities and Exchange Commission has been instructed by Congress to require—

> "by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system."[33]

The Commission may nevertheless permit a registered holding company to continue to control one or more additional systems if it finds that "all of such additional systems are located in *one state*, or in adjoining states, or in a contiguous foreign country and that the continued ownership of these additional systems by the holding company would be economically advantageous."[34]

[31] William O. Douglas, "Scatteration *v.* Integration of Public Utility Systems," 24 *American Bar Association Journal* 800 (1938).

[32] Most "new dealers" are far more prone to view with alarm the concentration of power in private hands than to be troubled about the dangers which are created by the vesting of broad powers in government officials.

[33] A holding company may submit to the Commission a plan of action which it proposes to take for the purpose of complying with this and other provisions of Section 11 of the Act.

[34] The Commission must also make certain additional findings before it can permit continued control of more than one integrated system.

The Commission has adopted a narrow interpretation of the words last quoted—an interpretation more consonant with the objectives of the statute than with its literal meaning. It has tentatively held that any additional systems which a utility may be permitted to control must be situated in *the same state* as the principal system, or in an adjoining state.[35] It has, in addition, tentatively adopted the view that an integrated system must be one of limited size even where the properties are interconnected and substantially contiguous. Thus it has told the great Commonwealth & Southern Corporation[36] that it probably will not be permitted to retain control of both Alabama Power Company and Georgia Power Company, although it is arguable that both companies combined constitute a single integrated system. Such a ruling does not, however, mean that the Commission is attempting to pulverise the utility industry into small units, for the assets of the Alabama Power Company are worth over $200,000,000[37] and the assets of the Georgia Power Company nearly $300,000,000.[38]

Obviously a decision that a holding company must divest itself of a certain subsidiary involves a further question of the method by which the securities of the subsidiary are to be disposed of. Here the Commission has proceeded with caution and with recognition of the undesirability of compelling the holding company to sell the securities at sacrifice prices. In some cases in which market conditions have made sales of the subsidiaries' securities to the public a practicable programme, it has authorised such sales. In other cases, it has approved the distribution of the subsidiary's securities among the shareholders of the holding company.

The Commission has recently announced that it is prepared to use its power to require simplification of capital structures as a means of facilitating distribution of a subsidiary's securities among the holding company's shareholders. Under the law of most of the states,[39] the holders of common shares may probably be required to accept shares of other companies as a dividend in liquidation or partial liquidation. On the other hand, the usual preferred shareholders' contract, which gives the holder a preferential claim to a certain number of dollars annually and to a

[35] *In the Matter of United Gas Improvement Co.*, Holding Company Act Release No. 2500 (January 22, 1941).

[36] *In the Matter of the Commonwealth & Southern Corporation*, Holding Company Act Release No. 2626 (March 19, 1941).

[37] Moody's *Manual of Investments, Public Utilities*, 1941, p. 1589.

[38] Moody's *Manual of Investments, Public Utilities*, 1941, p. 1602.

[39] Few of the state statutes are explicit on the point, but there are cases upholding such distributions. See, for example, *Venner* v. *Southern Pacific Co.*, 279 Fed. 832 (C.C.A. 2d, 1922); *Continental Securities Co.* v. *Northern Securities Co.*, 66 N.J. Eq. 274, 57 Atl. 876 (V.C. 1904).

certain number of dollars in liquidation, would seem to entitle such shareholders to payment in cash. Thus a holding company which has only a single class of shares outstanding should find no difficulty in distributing the shares of a subsidiary among its own shareholders; but a holding company which has a large issue of preferred shares outstanding is in a less favourable position. The Commission has stated that one of the bases of its tentative decision that the Commonwealth & Southern Corporation should transform its existing preferred shares into common shares pursuant to another subdivision of Section 11 is the desirability of simplifying that corporation's problem of disposing of the securities of a large number of subsidiaries which it will not be permitted to retain.[40]

The provision for simplification of capital structures is thus interrelated with the integration provision. But the former provision has other objectives as well, including the more equitable distribution of voting power and, in the Commission's view, the elimination of preferred share issues which have proved so excessive in quantity that large amounts of unpaid dividends have accrued on them. In a number of instances, the Commission has either approved a plan submitted to it by the corporation's management which substituted common shares for an existing issue of preferred[41] or has ordered the corporation to devise and submit a plan of that kind.[42] In such cases the Commission has the duty to determine whether the plan is "fair and equitable" as between the different classes of shareholders.[43] A federal district court has held that a plan so approved by the Commission is, when confirmed by the court, binding on dissenting preferred shareholders even though a similar plan, adopted by a majority of the shareholders of each class, would not bind dissenters under the law of the state which created the corporation.[44]

[40] *In the Matter of Commonwealth & Southern Corporation*, Holding Company Act Release No. 2831 (June 20, 1941).

[41] *In the Matter of Community Power & Light Co.*, 6 S.E.C. Reports 182 (1939); *In the Matter of Federal Water Service Corporation*, Holding Company Act Release No. 2635 (March 24, 1941). In each case the preferred shareholders were to receive approximately 95 per cent of the common shares of the recapitalised corporation.

[42] *In the Matter of Northern New England Company*, Holding Company Act Release No. 2737 (May 3, 1941).

[43] A majority of the Commission have taken the position that a finding that the present worth of the enterprise is less than the amount of the preferred shareholders' liquidation preference does not make it inequitable for the holders of the common shares to be given securities under the plan, if there is a reasonable prospect that there would ultimately be earnings available for the payment of dividends on the common shares. *Matter of Federal Water Service Corporation, supra*, note 41.

[44] *In re Community Power & Light Company*, 33 F. Supp. 901 (S.D.N.Y., 1940).

The remaining sections of the statute, as has been stated, are concerned with the regulation of the activities of holding companies and their subsidiaries rather than with compelling changes in their area of operations or corporate structure. Interstate holding companies are required to register with the Commission, and the Commission is given a large measure of control over such matters as alteration in the rights of security holders, issue of new securities, acquisition and disposition of securities or utility assets owned, declaration of dividends, and transactions between a holding company and its subsidiaries.[45]

The Commission's powers with respect to alterations in the rights of security holders, granted to it by Section 7 of the Act, overlap to some extent its powers under Section 11. Under Section 7, no alteration is permitted if the Commission finds that the alteration will result in an inequitable distribution of voting power or that "it is otherwise detrimental to the public interest or the interest of investors or consumers." Under Section 11, it is the Commission's duty to order alterations and to approve voluntarily submitted plans for alterations if it believes them to be necessary in order to bring about an equitable distribution of voting power or to simplify a complex capital structure.[46] Many alterations in security holders' rights present a problem under Section 11 as well as under Section 7. But some changes, such as reductions in the capital[47] represented by the common shares, have little or no relation to Section 11. In dealing with proposals for such reductions of capital, the Commission has adopted the policy of imposing restrictions, primarily in the interest of the preferred shareholders, on the use of the surplus created by such reduction for the payment of dividends.[48]

In exercising its powers with respect to the issue of securities,[49] the Commission has concerned itself with the question whether the terms of the security holder's contract adequately protect the investor. For example, bond issues which it has approved have uniformly contained restrictions on the payment of dividends

[45] Sections 6, 7, 8, 9, 10, 12, 13, 15 *U.S. Code Ann.* §§ 79*f*, *g*, *h*, *i*, *j*, *l*, *m*.

[46] In the case of subsidiaries which are not themselves holding companies, no change may be required except for the purpose of fairly and equitably distributing voting power.

[47] American state corporation laws, unlike the English Companies Act, usually permit a corporation to reduce its capital by vote of its shareholders, without any proceedings in court.

[48] See, for example, *In the Matter of Columbia Gas & Electric Corporation*, 4 S.E.C. Reports 406 (1939).

[49] The Commission's discretion with respect to security issues is very broad, except in certain cases, including cases in which the company is a subsidiary and the issue has been approved by the commission of the state in which the subsidiary is organised and doing business. See Sections 6*b* and 7, 15 *U.S. Code Ann.* §§ 79*f*, 79*g*.

without adequate allowances for depreciation and maintenance and, except in a few early cases, preferred share issues have contained provisions for the acquisition of voting control by preferred shareholders if a certain number of preferred dividends are unpaid.[50]

The Commission has also insisted that no company which is subject to the Act shall be permitted to issue additional bonds, even though its current earnings may be greatly in excess of its interest charges, if it has what the Commission regards as an unduly high ratio of bonds and preferred shares to common shares.[51] At first the Commission drew a sharp distinction between new issues and refunding issues, and was inclined to approve almost any refunding issue if it regarded the new issue as an improvement on the old one. But early in 1941 the Commission announced that it had decided that no such distinction was warranted by the Act,[52] and it has recently denied an application for an issue of refunding bonds on the ground that the corporation had not, in connection with the refunding process, done as much as it ought to have done to reduce an undesirably large indebtedness.[53]

One of the Commission's duties in connection with new issues is to pass upon the reasonableness of underwriting fees. After experiments with milder methods had produced unsatisfactory results, the Commission finally adopted a rule requiring competitive bidding for security issues except in certain special cases.[54] The full practical effects of this rule cannot be determined until the rule has been in operation for a longer period.

In giving the Commission power over declarations of dividends, Congress instructed it to make such rules and orders as it should deem necessary to prevent the payment of dividends out of capital or unearned surplus.[55] Since most state statutes permit the use of unearned surplus for dividend purposes, this provision of the Act has an important restrictive effect. The Commission has consistently refused to permit the payment of common share dividends in the absence of a showing that the corporation had sufficient earned surplus available for that purpose, but it has been less stringent with respect to dividends on preferred shares.

[50] See, for example, *In the Matter of West Penn Power Co.*, 5 S.E.C. Reports 376 (1939).

[51] *In the Matter of Consumers Power Co.*, 6 S.E.C. Reports 444 (1939).

[52] *In the Matter of Engineers Public Service Co.*, Holding Company Act Release No. 2535 (February 4, 1941).

[53] *In the Matter of Virginia Public Service Co.*, Holding Company Act Release No. 2896 (July 23, 1941).

[54] Rule U–50. A small minority of state utility commissions had previously adopted the policy of requiring competitive bidding.

[55] Section 12, 15 *U.S. Code Ann.* § 79*l*.

The Commission's most important function with respect to intercompany transactions is its duty to pass on service, sales or construction contracts between companies which are parts of the same system.[56] Prior to the adoption of the Act, many holding companies had made large profits by performing managerial or engineering services for their subsidiaries or by furnishing them with supplies, often at unreasonably high prices. Under the Act, such services cannot be performed by the holding company itself but only by a subsidiary or by a mutual service company. Such subsidiary or mutual service company is subject to the supervision of the Commission both with respect to the provisions of any service, sales or construction contract which it may make and with respect to the manner in which it performs such contract and allocates costs between the various subsidiaries which it serves. The Commission has made vigorous use of its powers with a view to making sure that the service is, as Congress specified, on a non-profit basis.

As in the case of the Securities Act and the Securities Exchange Act, the Commission has used the powers conferred upon it by this statute to bring about a number of reforms in methods of corporate accounting and to exert pressure on utilities whose assets are carried on their books at inflated figures to reappraise them. Whatever criticisms may be made of certain rulings, the general effect of its activities in the accounting field has been to make utility accounting more accurate and informative.

When the Public Utility Holding Company Act was passed, there were dire predictions that Section 11—called by its opponents the "death-sentence"—would not only prevent necessary expansion of the gas and electric industry but would destroy existing security values. Neither that section nor the Act as a whole has had any such consequences. It is now generally conceded that our pyramided holding company structures were undesirably complex and that their complexities increased the difficulty of detecting and preventing fraudulent practices. Unscrambling eggs is a difficult process, but the Commission has been alive to the difficulties and has proceeded with due deliberation. There are still wide differences of opinion with respect to such matters as the reasonableness of the statutory standards of physical integration and the economic and legal soundness of the Commission's interpretation of those standards and of its rulings on some questions, such as competitive bidding. But there is no doubt that utility accounting has been improved and that security holders and consumers have been protected against many

[56] Section 13, 15 *U.S. Code Ann.* § 79*m*.

objectionable practices which formerly were widely prevalent. Few of these practices are peculiar to the types of corporations which are dealt with in this statute, and our experience with its administration has been such as to make the *laissez faire* system of corporation law which applies to most types of corporations seem gravely defective in comparison.

The Commission and Corporate Reorganisation

Prior to 1934, the reorganisation [reconstruction] of insolvent corporations in the United States generally took place through the medium of receivership proceedings in the federal courts. In that year Congress adopted an amendment to the Bankruptcy Act which instituted a somewhat different procedure. At about the same time, the Commission was instructed by a provision of the Securities Exchange Act to make a study of reorganization practices and report the results of its investigation to Congress.

In 1938, Congress adopted a comprehensive revision of the entire Bankruptcy Act. Chapter X of the revised Act, which relates to corporate reorganisation, was largely based upon recommendations which were made by the Commission as a result of its investigation.[57] The 1934 Act required that all reorganisation plans be approved by the affirmative vote of two-thirds of the holders of each class of debts and (if the value of the assets exceeded the debts) of a majority of the holders of each class of shares, and further required that such plans be supported by a judicial finding of fairness and feasibility before they could become legally effective. The Commission judged these safeguards to be inadequate. It pointed out that it had often proved to be a relatively simple matter to mobilise sufficient votes of scattered and ill-informed security holders in favour of a reorganisation plan which was unfair to some class of investors. It marshalled statutes to prove that, in order to secure continuity in the operation of the business, federal judges had been, for the most part, inclined either to appoint no bankruptcy trustee at all, or to appoint an officer of the debtor corporation as trustee.[58]

[57] The Commission made an exhaustive investigation of the subject and published the results in an eight-volume *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganisation Committees* (1937–1940).

[58] The 1934 Act permitted the court to refrain from appointing any trustee, leaving the debtor corporation in possession subject to the orders of the court. Information which the Commission obtained relating to 814 out of a total of 955 bankruptcy reorganisation proceedings initiated during the year 1936 revealed that, in 545 out of these 814 cases, the debtor corporation was permitted to remain in possession, and that in many of the other cases the trustee was an officer of the debtor.

Such a trustee is obviously ill-suited to the function of advising the judge with respect to the fairness of a proposed reorganisation plan. Consequently, the judge was, under the system then in vogue, ordinarily dependent for criticism of the plan on such assistance as he might receive from small groups of litigious shareholders who were seeking to upset the plan, in many instances merely with a view to creating a nuisance value for their holdings by obstructive tactics. Under such circumstances, it was to be expected that many judges should be inclined to treat majority consent as almost conclusive evidence of the fairness of a plan.

Chapter X modifies the old system by requiring in most cases the appointment of a trustee unconnected with the business and by specifically imposing on the trustee the duty of formulating a reorganisation plan after hearing suggestions made by interested parties.[59] In order to give additional assistance to the judge, the Commission is empowered to make advisory reports on the fairness of a proposed plan in every case in which the corporate debts exceeded $3,000,000 and in other cases in which such a report was requested by the judge.[60] In its performance of this function, the Commission has from the outset taken the position that junior interests are not, under the "fair and equitable" test established by the statute, entitled to any share of the securities to be issued in reorganisation unless the value of the assets, measured by reasonably predictable earning power, exceeds the face amount of such claims as are entitled to priority—a position which has recently been upheld by the Supreme Court.[61] The Commission's advisory reports, which are based on very thorough investigations made by the staff of its reorganisation division and on public hearings, have proved of great value to security holders and to the judges who are charged with the duty of confirming or rejecting plans. But the judges have not lost their independence. There are a number of cases in which a judge, after receiving such a report, has rejected the Commission's valuation in favour of one which takes a somewhat more optimistic view of the prospects of the enterprise, and has thus permitted the members of a junior class to participate in a reorganisation from which the Commission was seeking to exclude them on the ground that they had no "equity" in the assets.

The Chapter also authorises the Commission, with the consent

[59] Bankruptcy Act, ch. X, §§ 156, 167, 169, 11 *U.S. Code Ann.* §§ 556, 567, 569.
[60] Bankruptcy Act, ch. X, §§ 172, 173, 11 *U.S Code Ann.* §§ 572, 573.
[61] *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 60 Sup. Ct. 1, 84 L. Ed. 110 (1939); *Consolidated Rock Products Co.* v. *Dubois*, 312 U.S. 510, 61 Sup. Ct. 675, 85 L. Ed. — (1941).

of the judge, to become a party to any reorganisation proceeding.[62] The Commission has made extensive use of this authorisation and has taken an active part in nearly all reorganisations of substantial size. The Commission has additional powers if the company which is being reorganised is a registered public utility holding company or a subsidiary. In such cases, the Commission has a right to be heard on the proposed appointment of any person as trustee, and has control over the solicitation of assents to a proposed reorganisation plan and a veto power over the confirmation of any plan.[63] In these utility cases the plans which have been approved by the Commission have invariably been confirmed by the courts.

Two Recent Statutes

Two recent statutes, the Trust Indenture Act of 1939[64] and the Investment Company Act of 1940,[65] confer on the Commission functions which are of considerable but not of major importance. The Commission devoted one volume of its reorganisation report to a study of the extent to which action or inaction by persons or institutions serving as trustees for bondholders has tended to increase the losses incurred by bondholders of insolvent companies.[66] It recommended to Congress that elaborate eligibility rules for trustees should be established, that trustees who were themselves creditors of the obligor corporation should, subject to certain exceptions, be required to share with the bondholders all collections which they should make within four months of default on the bonds, that registration statements filed pursuant to the Securities Act should contain more information about the provisions of the trust indenture than that Act had required, and also that the Commission should be given a rather wide discretion to insist on the insertion in trust indentures of such clauses defining the trustee's powers and duties as it might think necessary for the protection of bondholders. Congress adopted all of these recommendations except the last. The suggestion that the Commission be empowered to dictate the terms of the trustee's contract aroused considerable opposition, and the Act as finally adopted specifies certain clauses which may be, and some that must be, inserted in the trust indenture, thus leaving very little discretion to the Commission.

[62] Bankruptcy Act, ch. X, § 208, 11 *U.S. Code Ann.* § 608.
[63] Public Utility Holding Company Act, § 11, 15 *U.S. Code Ann.* § 79*k*.
[64] 15 *U.S. Code Ann.* §§ 77*aaa et seq.*
[65] 15 *U.S. Code Ann.* §§ 80*a–1 et seq.*
[66] *Report, etc.*, Part VI, *Trustees under Indentures.*

The Commission's principal functions under the Act are the determination of whether the trustee and the indenture meet the statutory standards, the granting of exemptions (as to which it has rather wide discretion), the determination of the extent to which the principal provisions of the indenture must be summarised in the prospectus, and the determination of the form and content of certain reports to be made by the corporation.

The Investment Company Act of 1940 is a more important statute than the Trust Indenture Act, but the Commission's function under that Act also is rather narrowly limited. Investment companies [investment trusts] were rather uncommon in the United States until the boom period 1921–1929, but they developed very rapidly during the boom. Many of them were sponsored and controlled by investment bankers. In a distressingly large number of cases, these banker-sponsors adopted the policy of using the investment companies as dumping grounds for securities owned by the bankers which they had been unable to sell to outside investors. Partly because of mismanagement and fraud, and partly because so many of the companies acquired their investments at peak prices towards the end of the boom period, the losses of investors in many of these companies were catastrophic.

The Public Utility Holding Company Act directed the Commission to make a study of investment companies and to report the results of its study to Congress. The Investment Company Act is a compromise between the legislation originally advocated by the Commission as a result of this investigation[67] and the views expressed by the representatives of the many investment companies whose reputations were unsullied by fraud. Although the Act is considerably less drastic than the original bill which was drafted by the Commission, it subjects investment companies to a substantial amount of regulation. Companies which are subject to the Act are required to register with the Commission. Registered companies are restricted with respect to such matters as the persons who may serve as directors and officers, the extent to which, without Commission approval, they can purchase securities from their officers, directors, principal shareholders, promoters or underwriters, the extent to which they can issue bonds or preferred shares, the extent to which one investment company may purchase the securities of another, and the manner in which investment companies may repurchase their own

[67] The *Commission's Report on Investment Trusts and Investment Companies* is as voluminous and exhaustive as its reorganisation report. A bill based on the Commission's recommendations was introduced by Senator Wagner early in 1940 and enacted in a modified form in August of that year.

securities.[68] The powers given to the Commission under the Act are largely confined to passing on claims for exemption either from the Act as a whole or from some of its provisions, to determining the content of reports which must be filed with the Commission and reports which must be sent to shareholders, to conducting investigations for the purpose of detecting violations of the Act, and to instituting court proceedings to enjoin such violations.

The discretionary powers which are conferred upon the Commission by these last two Acts are narrower than those which it sought to obtain and narrower than those which had previously been conferred on it by the Holding Company Act. That this has been the case is not due to any diminished confidence in the Commission. Congress has never deprived the Commission of any power once granted to it, and has constantly increased its powers by giving it important responsibilities in the administration of some new statute.

There has, however, been a decided change since 1935 in the attitude of Congress towards the general question of vesting broad discretionary powers in administrative agencies, particularly powers that involve interference with what admirers of the nineteenth-century type of capitalism customarily refer to as "free enterprise." The "new deal" measures of President Roosevelt's first administration, which included not only the Acts which we have been considering but such statutes as the National Industrial Recovery Act[69] and the National Labour Relations Act,[70] subjected American business to a wholly unprecedented amount of regimentation. A certain amount of revulsion of feeling was to be expected, but the effect of this change in the climate of opinion has been to make new grants of administrative power less extensive than earlier grants rather than to revoke or qualify any of the former.[71] American business is now faced with a degree of regimentation for an entirely different purpose—the co-ordination of American industry for the successful prosecution of the war against the Axis powers.

E. Merrick Dodd.

[68] The Act also provides for the registration of persons who give investment advice for compensation.

[69] Act of June 16, 1933, c. 90; held unconstitutional in *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570 (1935).

[70] Act of July, 1935, c. 372, 29 *U.S. Code Ann.* §§ 151 *et seq.*

[71] The Logan-Walter bill, a crudely drafted and inadequately considered measure for modifying the existing procedures of many administrative agencies, including the Securities and Exchange Commission, was passed by both houses of Congress in December, 1940, but was vetoed by President Roosevelt.

THE DUTIES OF NON-OCCUPIERS IN RESPECT OF DANGEROUS PREMISES

IT has long been established that the occupier of immovable property is under a certain duty of care with regard to it, and also that a non-occupier (e.g. a landlord) may be liable to persons outside the premises in an action of nuisance. The question here to be considered is this: when and to what extent are non-occupiers under a duty towards persons upon the premises in respect of the fitness and safety of those premises? It will be found that in practice this question subdivides into two. First, what is the duty of a lessor or vendor of premises? And second, what is the duty of one who has contracted to build or repair or fit premises or fixtures? These questions will be taken in turn.

(A) The Duty of a Lessor or Vendor of Premises

Before determining the extent of the duty of a lessor or vendor to third parties it is necessary to determine the extent of his duty to the lessee or purchaser. The rules on this subject are often stated in rather a sweeping and uncritical fashion, and it is proposed here to examine the cases somewhat carefully.

For our purposes it is not necessary to go back farther than the decision in *Smith* v. *Marrable* (1843).[1] There, the plaintiff had agreed to lease to the defendant a furnished house. It turned out that the house was infested with bugs, and the defendant quitted it. The plaintiff brought an action for the rent due after the tenant had gone out of possession, and failed. Lord Abinger, C.B., in his judgment confined himself expressly to leases of furnished houses, holding that there was an implied condition that such houses should be habitable. Parke, B., also held that there was this implied condition, but did not confine his statement of the rule to furnished houses; he approved and followed earlier cases at *nisi prius*[2] where a similar rule had been applied in leases of unfurnished houses. However, a short time afterwards, in the case of *Sutton* v. *Temple*,[3] Parke, B., concurred with his brother judges in regarding his judgment in *Smith* v. *Marrable* as supportable only if confined to furnished houses; and the earlier cases just mentioned were overruled.

The facts of *Sutton* v. *Temple* were these. The plaintiff had demised the pasturage of land to the defendant. The land proved

[1] 11 M. & W. 5.
[2] *Edwards* v. *Etherington* (1825), Ry. & M. 268; *Collins* v. *Barrow* (1831), 1 M. & Rob. 112.
[3] (1843), 12 M. & W. 53.

to have been poisoned by the presence of refuse paint in manure that had been used on it, and cattle put upon it died. There was no evidence that the plaintiff knew of the defect at the time of making the lease. It was held that the defendant was not released from his covenant to pay rent. The decision appears at first sight to be a simple application of the rule in *Paradine* v. *Jane*.[4] But there is this difference between the two cases, that *Paradine* v. *Jane* was a case of subsequent failure of consideration, while *Sutton* v. *Temple* was a case of initial failure. Suppose that the facts of *Paradine* v. *Jane* had been that the house was destroyed before the contract for the lease was made; is it certain that the lessee would still have been bound by his lease? If the justification for *Paradine* v. *Jane* is that the tenant takes the risk of the destruction of the premises (or other failure of consideration) during the term,[5] this in itself excludes a case where the destruction has already taken place at the commencement of the term, and *a fortiori* it excludes a case where the destruction has already taken place at the making of the contract for the lease. Looked at in this way, *Paradine* v. *Jane* was not a conclusive authority in *Sutton* v. *Temple*.

The chief argument for the defence was the analogy of the rule relating to the letting of chattels. It was and is well settled that on a contract of letting and hiring there is an implied warranty and condition precedent (i.e. taken together, an implied "condition" in the unfortunate sense in which that word is used in the Sale of Goods Act) that the chattel shall be reasonably fit for the purpose for which (as the letter knows) the hirer intends to use it. As Lord Abinger expressed it, "if a carriage be let for hire, and it breaks down on the journey, the letter of it is liable, and not the party who hires it. So, if a party hire anything else of the nature of goods and chattels. . . ."[6] It was because the case of *Smith* v. *Marrable* involved a letting of chattels as well as the lease of a house that the court in *Sutton* v. *Temple* was ready to uphold it. But it is not easy to see why the rule for chattels should not be applied to a lease purely of land. Parke, B., appears to have been moved chiefly by judicial caution or timidity. "No doubt," he said, "it is a hard case on the defendant, but we must not allow considerations of that kind to persuade us to introduce into the law an alteration of which we cannot foresee the consequences, by which the mere demise of a farm would

[4] (1647), Aleyn 26. This case does not appear to have been cited in *Sutton* v. *Temple*, but it was cited in *Hart* v. *Windsor*, which followed *Sutton* v. *Temple* (below).

[5] See (1941) 4 MODERN LAW REVIEW at 257.

[6] 12 M. & W. at 60.

carry with it an implied condition that the land was fit for the purpose for which the tenant took it."

The next case, *Hart* v. *Windsor*,[7] was heard by the same court shortly after *Sutton* v. *Temple*. The facts were similar to those in *Smith* v. *Marrable* save that the house was unfurnished, and it was held, distinguishing *Smith* v. *Marrable*, that the tenant was not excused from paying rent. Again the Court was largely guided by the fear of unlimited "inconvenience" that might result from a contrary rule. Parke, B., expressly refrained from deciding whether the tenant would not have been exonerated "on the ground of fraud in the plaintiff, if the plaintiff knew of the defect in the house himself, and that the defendant would not have taken the house, if he knew it."

It is to be observed that in neither of these last two cases did the defendant counterclaim for damages for breach of an implied warranty that the premises should be reasonably fit. Although the Court was clearly against the existence of such an implied warranty, the point was not technically before the Court and its remarks on it were *obiter*. Nor was there any discussion of the liability of the lessor in an action of negligence for damage suffered by the lessee in consequence of the defective nature of the premises.

The possibility of regarding a lessor who refrained from disclosing a defect in the premises as guilty of fraud was partially closed by the decision in *Keates* v. *Cadogan* (1851).[8] That was an action on the case in which the declaration alleged that the defendant had let a dwelling house to the plaintiff for the purpose of immediate occupation, knowing it to be ruinous and not communicating this fact to the plaintiff. It was held by the Court of Common Pleas that the action failed, no fraud having been made out. "The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, *viz.* make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it" (Jervis, C.J.). This ruling may be fair enough if the house is obviously unfit for habitation, for in that case it is reasonable for the lessor to suppose that the lessee has examined the house and seen the defect. Even if the lessor knows that the lessee has not seen the defect, still if the defect is reasonably discoverable upon inspection the lessor is entitled to preserve a discreet silence about it. This is simply an

[7] (1843), 12 M. & W. 68. *Cp. Cruse* v. *Mount*, [1933] Ch. 278.
[8] 10 C.B. 591.

application of the general principle *caveat emptor*. But if the defect is not reasonably discoverable upon inspection and is known to the lessor it is submitted that he ought to be under a duty to disclose it. Such a duty could be enforced by allowing the lessee one or other of three actions: an action in deceit based on an implied representation that the lessor knows of no fact, not discoverable by the lessee on reasonable examination, that makes the premises unfit for the purpose;[9] or an action in negligence based on a breach of a duty to take care to make the disclosure; or an action in contract based on an implied warranty to the same effect. It is submitted that there is nothing in the cases so far examined to prevent a court from allowing any of these three actions. In *Keates* v. *Cadogan* Jervis, C.J., said: "It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation." But the question of warranty was not before the Court, and in any case the implied warranty that has just been contended for is a narrower one than a warranty that the house is fit for immediate occupation. It is a warranty confined to facts known to the lessor that he cannot reasonably anticipate will be discovered on inspection by the lessee.

The case of *Wilson* v. *Finch Hatton* (1877)[10] presents difficulties for the orthodox theory that there is no implied warranty on the lease of a house. The facts and decision were similar to those in *Smith* v. *Marrable*, save that the defect in the house was not bugs but bad drains. What is not at all clear from the judgments is the principle on which the decision was rested. Three possible *rationes decidendi* may be advanced: first, that the house was a furnished one; second, that it was let for immediate habitation; and third, that the defect was not reasonably discoverable by the tenant before going into possession.

In support of the first interpretation, that the decision is limited to furnished houses, it may be pointed out that the judgments affirm and follow the rule in *Smith* v. *Marrable*, which in *Sutton* v. *Temple* was approved only as confined to furnished houses. In both *Smith* v. *Marrable* and *Wilson* v. *Finch Hatton* the house was a furnished one, and the judgments in *Wilson* v. *Finch Hatton* frequently mention the fact. But there is a difficulty in the way of supposing that *Wilson* v. *Finch Hatton* is a simple

[9] For numerous cases on implied representations (none of them directly in point) see Spencer Bower, *Actionable Misrepresentation*, 2nd ed., 65–72. Perhaps the nearest is *Gill* v. *McDowell*, [1903] 2 I.R. 463, where it was held that fraudulently to sell a hermaphrodite was to sell a "living lie." If in *Sutton* v. *Temple* (above) the lessor had known that the pasture was poisoned, might it not have been said that he, too, "sold a lie"?

[10] 2 Ex. D. 336.

application of the rule in *Smith* v. *Marrable*. The rule in *Smith* v. *Marrable*, as approved in *Sutton* v. *Temple*, depended on the fact that there was a letting of chattels as well as a lease of land. It is well established that on a letting of chattels there is an implied warranty and condition precedent that they are reasonably fit for the purpose of the hirer known to the letter. The contract being an entire one, it follows that on non-fulfilment of this condition in respect of the chattels the whole bargain falls to the ground. In *Smith* v. *Marrable* the house was infested with bugs, which were obviously in the furniture as well as in the fabric of the house, and there was therefore a failure of condition in respect of the chattels, which defeated the whole contract. In *Wilson* v. *Finch Hatton*, however, the defect alleged was that the drains were defective: this had nothing to do with the furniture, yet the tenant was held entitled to avoid the lease. Pollock, B., agreed that in *Smith* v. *Marrable* both house and furniture were infested; yet he deduced from this the conclusion that a defect in *either* entitled the tenant to avoid the lease. The question is this: if on the facts the defect is confined to the building, on what intelligible principle is the tenant's right to avoid dependent on the question whether furniture was let at the same time as the building?

A second possible interpretation of the decision is that it is not confined to furnished houses but applies to all short tenancies of houses let for immediate occupation. Kelly, C.B., emphasised both the point that on the facts the tenancy was a short one (three months) and the point that the tenant was intended to go into immediate occupation. "Where," he said, "real property, such as a house and lands, is taken by a tenant in a state so dilapidated as to require a large expenditure of money to put it into repair, to hold that the contract contained an implied condition that the lessor should put such premises into repair, would be clearly contrary to the intention of the parties. When, however, a person takes a furnished house for a brief period of time it is clear that he expects to find it reasonably fit for occupation from the very day on which he intends to enter, and the lessor is well aware that this is the view entertained by the tenant. If indeed this were not so, what limit could be imposed to the time during which the tenant might be kept out of possession, and how long would he have to wait while the value of his tenancy was daily diminishing?" This reasoning is equally applicable to a short lease of an unfurnished house let for immediate occupation. It also seems to be applicable even to a long lease, if the unfitness is such as will last for the whole of the lease. In *Sutton* v. *Temple*, for instance, the lease of the pasturage was for seven

months, and the condition of the land was such that it was evidently unfit for pasturage for the whole of the term. According to the reasoning in *Wilson* v. *Finch Hatton* the tenant ought to have been excused from the payment of rent; yet in *Sutton* v. *Temple* he was not excused.

It may be added that in later cases the decision in *Wilson* v. *Finch Hatton* has not been regarded as confined to short tenancies. Thus it has been applied to a lease of a furnished house for as long a period as two years.[11] This seems to knock the bottom out of this second interpretation of the decision.

There is a third possible opinion as to the *ratio decidendi* of *Wilson* v. *Finch Hatton*. On the facts of the case (as indeed in *Smith* v. *Marrable*) the defect was not reasonably discoverable by the tenant before going into possession, and it may be contended that this was the vital point. When Kelly, C.B., said that on the lease of a dilapidated house, "to hold that the contract contained an implied condition that the lessor should put such premises into repair, would be clearly contrary to the intention of the parties," he was evidently thinking of patent dilapidation. If the defect is latent it is not "clearly contrary to the intention of the parties" to imply a term; and that is why the Court was able to imply the term in *Wilson* v. *Finch Hatton*. Suppose that in *Wilson* v. *Finch Hatton* the house had been obviously dilapidated, and, so far as the lessor knew, the lessee had inspected it; would the lessee still have been excused from his contract? It is submitted that he would not. Ought not the law to be, then, that a warranty and a condition as to reasonable fitness are implied both in leases of furnished houses and in leases of other premises unless in either case the lessor has reason to believe that the lessee is taking it with his eyes open? It may be that we are precluded by authority from stating that this is the law with regard to premises other than furnished houses where the lessor does not know of the defect; but it is submitted that there is no binding authority preventing a court from adopting the rule where the lessor does know of the defect.

If the theory of implied warranty be disliked, it is possible, as has already been suggested, to reach somewhat the same result by means of actions of deceit and of negligence. It may be freely conceded that, generally speaking, there would be no justification for giving the lessee an action of negligence against his lessor simply because the premises are not reasonably fit for the lessee's known purpose. Generally speaking, the lessor is entitled to assume that the lessee will examine the premises

[11] *Harrison* v. *Malet* (1886), 3 T.L.R. 58.

before taking a lease of them, and that he will take their then condition into account in determining the rent that he is prepared to pay. The lessor cannot be regarded as guilty of negligence merely because, before letting the premises, he does not examine them to see if they are fit for the known purpose of the lessee. Even if he knows of defects, if those defects are reasonably discoverable by the lessee on examination the lessor is entitled to assume that he will discover them. But these considerations do not apply if there are defects in the premises of which the lessor actually knows, and if he also knows that they are not likely to be discovered by the lessee (we may call them, for short, latent defects). In such a case it is consistent with the general principles of the law of negligence to impose upon the lessor the duty to communicate the defects to the lessee.

There would be some difference between the extent of the remedy given by the suggested actions for breach of warranty, deceit, and negligence respectively. As for the first, if the Court is ready to imply a warranty that the lessor has disclosed any known latent defect, it will probably be ready to imply also a condition precedent to the same effect. Then, if it is found that the lessor has not made proper disclosure, the tenant can avoid his obligation for non-fulfilment of the condition precedent, and/or recover damages under the warranty. The damages will cover (i) the loss of his bargain or (if he does not avoid the lease) the diminished value of the leasehold interest owing to the breach of warranty, and (ii) any injury and damage sustained in consequence of the defect (e.g. by the tenant's falling through the floorboards). Second, if the case is regarded as one of deceit, the tenant can avoid the lease in accordance with the ordinary rules for deceit, and can sue for damages. The damages in deceit, if the tenant does not avoid the lease, are not quite the same as the damages for breach of warranty. They cover the total amount of the rent paid and payable by the lessee, less the value of the leasehold interest.[12] Moreover, whether the tenant avoids the lease or not, he can of course recover damages for injury to the person or damage to property sustained in consequence of the defect. Third, if the case is regarded as one of negligence in not disclosing the latent defect, the tenant cannot for that reason avoid the lease; nor, it seems, can he for that reason recover damages for the diminished value of his bargain or other general economic loss.[13] The duty in negligence is a duty to prevent

[12] *Cp.* Spencer Bower, *Actionable Misrepresentation*, 2nd ed., 152, 221.
[13] *Cp.* Bohlen in (1929), 45 L.Q.R. at 349, and article in *Law Journal*, 25th April, 1942.

injury, not a duty to prevent others from saddling themselves with a bad bargain. The only damages that the tenant gets in an action of negligence are those for injury to his person[14] or damage to his property[15] sustained in consequence of the defect.

There is another difference between the extent of the three remedies, namely in their availability to third parties. As regards the implied warranty, it is clear that third parties (e.g. invitees of the tenant) who have been injured in consequence of the non-disclosure cannot sue on the warranty as such. Nor will they have an action in deceit, unless the lessor intended them to rely upon the implied representation[16]—a fact that would usually be difficult to establish. But if an action of negligence be once conceded to the lessee, its availability to third parties, if the Court acts in the spirit of *Donoghue* v. *Stevenson*,[17] can hardly be doubted. The justification for this can be stated in a very few words. We assume, as our hypothesis, that the lessor is under a duty of care towards the lessee to disclose to him known latent defects. If the lessor complies with his duty, the responsibility to third parties is thereafter with the lessee. But if the lessor does not comply with his duty, it is unlikely that third parties who are injured will have a remedy against the lessee, because it is unlikely that they will be able to fix him with negligence. Therefore, in justice, they should have a remedy against the lessor.

It is interesting to note that this result has already been reached by the best modern opinion in the United States. The *Restatement of the Law of Torts*, in §§ 355 and 356, reproduces the general principle that a lessor is not liable to the lessee or others upon the land who are injured as a result of its dangerous condition. But § 358 states by way of exception to this that "a lessor of land, who conceals or fails to disclose to his lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land, is subject to liability for such harm caused thereby to the lessee and others on the land with the consent of the lessee or a sublessee after the lessee has taken possession, if (*a*) the lessee does not know of the condition or the risk involved therein, and (*b*) the lessor knows of the condition and realises the risk involved therein and has reason to believe that the lessee will not discover the condition or realise

[14] Including persons in whom he has a legal interest—i.e. his wife and servants.

[15] The rule in the *Restatement*, however, does not cover damage to property. See below, p. 203.

[16] *Langridge* v. *Levy* (1837), 2 M. & W. 519, affd. (1838), 4 M. & W. 337.

[17] [1932] A.C. 562.

the risk."[18] The illustration given is as follows. "*A* leases a newly-built dwelling to *B*. *A* knows that the joists under the living-room floor are so flimsy that any reasonable person with *A*'s knowledge of the character of the joists would realise that there was a likelihood of the floor giving way. After the dwelling is completed, the joists are concealed by the floor of the living room and the ceiling of the cellar below. *A* does not inform *B* of the true character of the joists. *B*, on taking possession, gives a house warming. While he and his family and his guests are in the living room, the floor gives way, throwing them into the cellar and harming *B*, his wife *C*, and his guest, *D*. *A* is liable to *B*, *C* and *D*."

It is submitted that there is nothing in the English authorities (apart from certain unduly wide dicta) to prevent a similar result from being reached here. Three cases are usually quoted for the non-liability of the landlord in tort to third parties who are injured upon the premises: *Robbins* v. *Jones* (1863),[19] *Lane* v. *Cox* (1897),[20] and *Cavalier* v. *Pope* (1906).[21] In *Robbins* v. *Jones* the rule was laid down that "a landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any." This is no doubt the general principle, but the facts proved in *Robbins* v. *Jones* did not raise the specific exception just quoted from the *Restatement*. The same remark applies to the other two cases. In *Cavalier* v. *Pope* there was another fact that took the case out of the suggested exception, namely that the tenant had come to know of the dangerous condition of the premises before his wife suffered the injury. If the landlord's only duty is to communicate known defects to the tenant, it is obvious that when the tenant (or other person who is injured) has come to know of the defect *aliunde* before the injury, the landlord's failure to communicate cannot

[18] For authorities see Harper, *Torts* § 103. Another exception developed in the U.S. is where land is leased for a purpose involving the admission of numerous persons and the lessor knows or ought to know of its dangerous condition: see Harper, *loc. cit.*; *Restatement, Torts*, § 359; Bohlen, *Studies*, 70–6.

[19] 15 C.B. (N.S.) 221 at 240. The judgment was delivered by Erle, C.J., but written by Willes, J. (see the report at p. 223).

[20] [1897] 1 Q.B. 415.

[21] [1906] A.C. 428. See also *Bromley* v. *Mercer*, [1922] 2 K.B. 126. Commenting upon the rule in *Cavalier* v. *Pope*, Pollock wrote: "A would-be tenant may of course have the property inspected and tested before agreeing to take them [*sic*], but the majority of tenants cannot afford to do this, and yet, strange to say, the landlord will be under no liability even though he knew at the time the unsuspecting tenants walked into the premises that they were unfit for habitation (*Hart* v. *Windsor*, 12 M. & W. 68)": (1908), 24 L.Q.R. 241. It is submitted that neither *Hart* v. *Windsor* nor *Cavalier* v. *Pope* is conclusive authority for the last part of this proposition.

be the cause of the injury. Nor does it matter that the tenant acquires the knowledge only after the lease is made. The purpose of imposing the duty on the landlord is (as has already been observed) not to aid the tenant in making a good bargain when entering into the lease, but to protect him and others from physical danger of which he is unaware. As soon as the tenant comes to know of the danger, whether it be before or after the lease is made, the purpose of the rule is satisfied and the landlord's duty is fulfilled. If the tenant is to be given legal protection against making a bad bargain, this can be done only by allowing him to avoid the lease for failure of implied condition or fraud, or by giving him an action for breach of an implied warranty, or an action for deceit by means of an implied representation. Protection by means of the implied warranty has in fact been given in certain cases by section 2 of the Housing Act, 1936.

So far we have been speaking only of the relationship of landlord and tenant. It is generally assumed that the relationship of vendor and purchaser is on a similar footing, and it is submitted that it is open to a court to hold that a vendor is under the same duty to disclose latent defects known to him as that described above in the case of the landlord.[22] Again this is the rule adopted in the *Restatement*.[23]

There is another way (not noticed in the rules in the *Restatement*) in which, it is submitted, a vendor or lessor ought to be liable in negligence to a purchaser, lessee, or third party. This is where the vendor or lessor has himself (or through his servants) erected the building, and has carelessly created a dangerous trap *i.e.* a latent defect). In such a case it is submitted that the vendor or lessor ought to be liable for damage to the person or to property resulting from his carelessness, whether he knew of the danger or simply ought to have known of it.[24] This rule would simply put a builder who builds on his own land and then

[22] In *Otto* v. *Bolton*, [1936] 2 K.B. 46, Atkinson, J., held that a jerry-builder who sold a completed house was not liable for defective construction to a third party who was injured thereby, notwithstanding that "the men who did the work knew it was bad and must have known it was dangerous" (at p. 51). However, it was not proved that the builder himself knew of the danger.

[23] § 353, operating as an exception to the general rules stated in §§ 351 and 352. See also Harper, *Torts*, § 100.

[24] The reader may have noticed that although this case is not covered by § 358 of the *Restatement of Torts*, quoted above, it is covered by the Illustration given of the rule. The rule itself is limited to cases where "the lessor knows of the condition and realizes the risk involved therein." But the Illustration puts a case where all that is stated is that "*A* knows that the joists under the living floor are so flimsy that any reasonable person with *A*'s knowledge of the character of the joists would realize that there was a likelihood of the floor giving way." This is evidently less stringent than a requirement that *A* should actually realise the risk.

sells or leases it in the same position as a builder who builds on the land of another under contract.[25] There are, however, three cases against the suggested rule. In the unfortunate case of *Bottomley* v. *Bannister* (1932),[26] the Court of Appeal applied the rule in *Robbins* v. *Jones* although the negligent conduct alleged against the landlord was that before the tenancy commenced he had carelessly created a highly dangerous trap, namely an improperly ventilated gas boiler. Greer, L.J., and apparently also Scrutton, L.J., regretted the rule that they were laying down,[27] but supposed that they were bound by the authority of *Robbins* v. *Jones*, *Lane* v. *Cox*, and *Cavalier* v. *Pope*. Actually, it is submitted there was a clear distinction between these cases and the case before the Court. It is one thing to say that the owner of a tumble-down house is not bound to repair it before he sells or lets it; it is quite another to say that he is under no duty of care not himself to create dangerous traps in the house before he sells or lets it. It may be added that on the actual facts it was unnecessary for the Court to lay down a rule of law excusing the landlord, because the plaintiff had failed to make out his charge of carelessness, as Scrutton, L.J., expressly held.

In *Otto* v. *Bolton* (1936),[28] Atkinson, J., had to decide whether *Donoghue* v. *Stevenson* had overruled *Bottomley* v. *Bannister*. He held "with great regret" that it had not, and that a vendor-builder was under no duty of care in tort to the purchaser's mother, on whom the ceiling fell. It is submitted, however, that it is still open to the House of Lords to say that where the owner before selling or leasing has been guilty of a positive act of negligence creating a dangerous trap, he is liable under the principle of *Donoghue* v. *Stevenson*. This would involve overruling the decision on the point of law in *Bottomley* v. *Bannister* (though not the decision on the actual facts of the case). It would not involve an overruling of *Cavalier* v. *Pope*, which decision is in any event binding upon the House of Lords. *Otto* v. *Bolton* may still possibly be supported on the ground that the defective condition of the ceiling was visible and so was not a trap; but it may be doubted whether on the facts the visible blobs on the plaster made the danger a patent one.

The unfortunate effect of *Bottomley* v. *Bannister* was shown in *Davis* v. *Foots* (1939).[29] In that case the tenant of a flat and his newly-wedded wife were asphyxiated on their first night in

[25] See section (B) of this article.
[26] [1932] 1 K.B. 458.
[27] [1932] 1 K.B. at 478, 469.
[28] [1936] 2 K.B. 46.
[29] [1939] 4 All E.R. 4; see note in (1939) 17 Canadian Bar Review 753.

the flat. What had happened was that the landlord's son, in removing the landlord's gas fire from one of the rooms before the tenant took over, left a gas pipe without a tap on it. When later the gas was turned on by the gas company the room became filled with gas, as a result of which the tenant died and his wife became seriously ill. It was held by the Court of Appeal, following *Bottomley* v. *Bannister*, that the landlords were not liable because they were under no duty. No doubt the Court of Appeal was bound by its own previous decision in *Bottomley* v. *Bannister*, but it is submitted that had the case been taken to the House of Lords it would have been open to their Lordships to overrule *Bottomley* v. *Bannister* and impose liability. Although the careless act was committed by the landlords' son, he might well on the facts have been regarded as their servant for whom they were vicariously liable.

It must be added that in *Davis* v. *Foots* du Parcq, L.J., held that there was one particular reason for holding that the principle of *Donoghue* v. *Stevenson* did not apply, namely that there was a reasonable opportunity for examination. "This," he said, "was not a latent defect. It was quite apparent on any examination, and one would think only too plainly apparent, as soon as the gas was turned on. One would have said it was inevitable that it should have been noticed." With all respect, it may be doubted whether this was the proper way to look at the matter. It is true that in *Donoghue* v. *Stevenson* expressions were used that seemed to make the duty conditional upon there being no reasonable possibility of intermediate examination. But this must be understood with reference to the facts of the case, and in a careful judgment in *Herschtal* v. *Stewart & Ardern, Ltd.* (1940)[30] Tucker, J., held that it is not the reasonable *possibility* of examination that matters but the reasonable *anticipation* by the manufacturer (or other defendant) that the examination will take place and the defect, if any, be discovered. This judgment was approved by Scott, L.J., in *Haseldine* v. *Daw*,[31] and it seems to have everything to commend it. Indeed, it would greatly simplify the decision of this type of case if it were to be recognised that there is in truth no special question concerning intermediate examination, but only the general question: Has the defendant been guilty of negligence causing the accident?[32] In *Davis* v. *Foots* the proper question for discussion was whether the landlords (or their servant) were negligent in not giving warning of the danger

[30] [1940] 1 K.B. 155.

[31] [1941] 2 K.B. at 363. In the same case, at p. 377, Goddard, L.J., disapproved *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382.

[32] See article in *Law Journal*, 18th April, 1942.

created by the open gas pipe, or whether they reasonably believed that no warning was necessary, because the danger was patent.[33] In deciding this question it was not enough to say that the absence of a gas tap would have been patent to a tenant who examined the pipe; the question was whether danger from gas would have been patent to a tenant who gave the house as a whole the sort of examination that might reasonably have been expected. This is a question of fact, and it is submitted that if the case had been heard with a jury it would have been a jury question. If it be agreed to be a question of fact, the particular way in which the Court answered it in *Davis* v. *Foots* is of no legal interest.

One other recent case may be mentioned, the decision in which would still stand even if *Bottomley* v. *Bannister* were overruled. In *Hoskins* v. *Woodham* (1938),[34] the purchaser of a house that was newly built but had been completed at the time of the contract of sale[35] brought an action for damages for the diminished value of the house owing to damp floors. It does not appear from the report that the vendor knew of the defect at the time of the sale. The action failed, Macnaghten, J., holding that on a sale of a completed house there is no implied warranty of soundness, even though the sale is by the builder. Clearly the action could not have been framed in tort, because the damages that the plaintiff was claiming were appropriate to contract and to contract alone.[36] The decision would therefore not be affected by the overruling of *Bottomley* v. *Bannister* in the law of tort. If in *Hoskins* v. *Woodham* the plaintiff had been suing for damage, caused by the defendant's negligence in the building of the house, other than the diminished value of his bargain—if, for example, his furniture had sustained damage from the dampness—it is submitted that it would have been open to the House of Lords to allow recovery.

(B) The Duty of one who has Contracted to Build, Repair or Fit Premises or Fixtures

In order to discuss the law relating to this type of duty it will be convenient to discuss a number of hypothetical cases. *A*, let us say, is the occupier of a house. *B* is a person lawfully in the house (*e.g.* an invitee) who is injured by a defect in it. Let

[33] Of course the question of contributory negligence may also arise; but it was not raised in *Davis* v. *Foots*.

[34] [1938] 1 All E.R. 692.

[35] For the case of a house uncompleted at the time of the contract of sale, see below, (B) *Case* 4.

[36] See above, p. 200.

us examine in turn some of the chief combinations of fact that may have brought about this injury.

Case 1. *A* employs *C* to overhaul the house and execute repairs where necessary. The repairs are done carelessly, as a result of which *B* is injured. In *Haseldine* v. *Daw* (1941)[37] the Court of Appeal held that *B* has no action against *A*. But it is now clear law that he has an action against *C*. This was so, at least in certain circumstances, even before *Donoghue* v. *Stevenson*.[38] In *Parry* v. *Smith* (1879)[39] a gas fitter carelessly left a leaky gas pipe on premises where he was altering the gas fittings, and was held by Lopes, J., to be liable in tort to a servant of the occupier. The judgment was rested on the ground that gas was dangerous *per se*, but it is submitted that it can now be applied equally to things that are dangerous in the circumstances.[40] The decision was followed by the Privy Council on somewhat similar facts in *Dominion Natural Gas Co.* v. *Collins* (1909).[41] Since *Donoghue's* case the rule has been applied in *Brown* v. *Cotterill* (1934)[42] (the case of the tumbling tombstone) and *Haseldine* v. *Daw* (where a firm of lift mechanics were held liable to a third party for negligent repair). These cases, and others, have effected a great extension of the narrower rule stated by Lord Atkin in *Donoghue* v. *Stevenson* (the "manufacturer" dictum).[43] Whereas the rule as stated by Lord Atkin dealt only with the liability of the "manufacturer," these cases have extended it to repairers and fitters.[44] Whereas the rule was stated only for "products," which seems to mean moveable property, these cases have extended it to cover fixtures. Whereas the rule dealt only with the right of the "consumer," these cases have extended it to protect all users and even those who do not use the noxious thing but are in physical proximity to it. Moreover the requirement as to the "form" in which the "product" leaves the "manufacturer" has

[37] [1941] 2 K.B. 343.

[38] [1932] A.C. 562.

[39] 4 C.P.D. 325.

[40] See *Donoghue* v. *Stevenson*, [1932] A.C. at 596, 611.

[41] [1909] A.C. 640. Reference may also be made to *Heaven* v. *Pender* (1883), 11 Q.B.D. 503. Certain dicta to a contrary effect are examined and disapproved by Bohlen, *Studies*, 98–103. But one of them, the dictum of Willes, J., in *Collis* v. *Selden* (1868), L.R. 3 C.P. 495 at 497, was quoted as an authority by Atkinson, J., in *Otto* v. *Bolton*, [1936] 2 K.B. at 52.

[42] 51 T.L.R. 21.

[43] [1932] A.C. at 599: "By Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

[44] See this and the other extensions discussed in a series of articles in the *Law Journal*, 11th, 18th and 25th April, 1942.

been modified out of existence; and, as has been said, there is now authority for changing the words "with no reasonable possibility of intermediate examination" to "with no reasonable anticipation of intermediate examination," which again widens the scope of the remedy.

Case 2. As before save that *C* takes no step towards performing his contract with *A*, as *A* knows. Here it seems that *C* is not liable to *B*. The duty to see that the premises are safe rests primarily upon *A*, the occupier, and the mere non-performance by *C* of his contract with *A* does not render *C* liable in tort to third parties. This is supported by *Winterbottom* v. *Wright* (1842),[45] which seems still to be good law to this extent.[46] Correlatively the mere fact that *A* has made the contract with *C* will obviously not be a defence to *A* in an action under *Indermaur* v. *Dames*,[47] if a reasonable time has elapsed for the repair to be completed.

Case 3. Again *C* does not repair the defect, but the facts are slightly different from Case 2. (i) *C* knows that in reliance on his performance *A* is quitting the premises and taking no further steps to see that the repairs are carried out. *Or* (ii) *C* reports to *A* that no repairs are necessary, and *A* reasonably believes this. *Or* (iii) *C* reports to *A* that the repairs have been done, but actually the defect in question has been left unremedied. In each of these three cases *A* would normally have a defence to an action by *B* under *Indermaur* v. *Dames*, for he has not been careless. It is therefore submitted that *B* ought to be given a remedy in tort against *C*, if *C* has been careless, the case being something more than mere nonfeasance by *C* of his contractual obligation.

Case 4. *A* has bought the house from *V*, a vendor-builder. The contract of sale was entered into before the house was completed, and *V* contracted that the house should when completed be fit for habitation. The defect that injures *B* is due to the careless building of the house by *V*, and *A* was not negligent in failing to observe the danger and get it put right. It has already been submitted that it is open to the House of Lords to give *B* a remedy against *V* even though *V* had not contracted to make the house fit for habitation.[48] It is now to be submitted that on the facts here presented (viz. where *V* has so contracted) it is open even to the Court of Appeal to give *B* this remedy.

[45] 10 M. & W. 109. See also *per* Collins, M.R., in *Cavalier* v. *Pope*, [1905] 2 K.B. 757 at 764.

[46] See the discussion in Bohlen, *Studies*, 76–80, and the treatment of the case in *Donoghue* v. *Stevenson*, [1932] A.C. at 588–9, 592, 608.

[47] (1866), L.R. 1 C.P. 274, affd. (1867), L.R. 2 C.P. 311. No attempt is made in this article to state the extent of the occupier's duty to persons other than invitees; that would take us too far from the main inquiry.

[48] Above, p. 204.

In *Bottomley* v. *Bannister*[49] *V* agreed to sell to *A* a house then in course of erection, expressly agreeing to make it fit for habitation. *A* was given the option to go into possession before the house was finished as a tenant at will. *A* exercised the option, and a month later he and his wife died from gas poisoning, as a result, it was alleged, of the careless construction of a boiler. The Court of Appeal held, as we have already seen, that *V* was not liable in tort merely as vendor or as landlord. It was further held that *A* had no action against *V* on the contract. Scrutton, L.J., put this latter ruling on the ground that there was no evidence that the boiler was improper, the tragedy apparently having occurred through *A* or his wife having tampered with the gas supply. Greer, L.J., put it on two grounds: first, that the action was framed in tort, not contract; and second, that as the date for the finishing of the house had not arrived when *A* met his death it could not be said that the death was due to a breach of contract, inasmuch as *V* still had time to comply with that term of his contract. Romer, L.J., the third member of the Court, also took Greer, L.J.'s, second point.

It is clear from this that if the action had been framed in contract, and if the Court had been satisfied that there had been a negligent breach of contract, and no contributory negligence by the deceased, *V* would have been liable in contract for the death of *A*. In that event, it is submitted, *V* should also since *Donoghue* v. *Stevenson* and *Haseldine* v. *Daw* be held liable in tort for the death of *A*'s wife. There is no substantial distinction between *V*'s position and that of the lift repairer in *Haseldine* v. *Daw*. It is true that *V* in the case under discussion is a vendor of the house as well as a person who has contracted to build it, but it is submitted that there is nothing in the fact that he sells the house that should cast a cloak of immunity round him in his capacity of a person who has contracted to build. The only tort point that Scrutton, L.J., and Romer, L.J., actually decided in *Bottomley* v. *Bannister* was that *V* was under no duty simply in his capacity of vendor. Greer, L.J., also held that *V* was under no duty in tort simply because he had contracted to build the house, even if he built it badly; but this was not the judgment of the whole Court and it is submitted that since *Haseldine* v. *Daw* the Court of Appeal might feel itself free to disagree with Greer, L.J.'s, view.

The decision in *Otto* v. *Bolton*[50] is not against the rule here suggested, for the sale in that case seems to have been treated as

[49] [1932] 1 K.B. 458.
[50] [1936] 2 K.B. 46.

(in substance) the sale of a completed house.[51] There was, indeed, an express warranty by the vendor-builder that the house was well built, but by its very nature this warranty could sound only in contract (for the benefit of the other party to the contracts), not in tort (for the benefit of third parties). The warranty was simply a contractual assurance as to past conduct, not an undertaking as to present or future conduct. It is only the latter kind of undertaking that can raise a duty of care in tort.

It remains to note the decision in *Perry* v. *Sharon Development Co. Ltd.* (1937),[52] where it was held that on facts like those in *Bottomley* v. *Bannister*, where there is a sale of an uncompleted house, the vendor agreeing to complete it, there is no need for the purchaser to obtain an express warranty that the house shall be properly built, for this warranty is implied. It was further held that the warranty applies to the part of the building that has been completed before the contract of sale as well as to the part that is completed afterwards, for if at the time of the contract there is a defect in the part already built, the implied warranty obliges the builder to set it right.[53] The action in *Perry's* case was simply an action by the purchaser in contract for the diminished value of the building. But it is submitted that he could also have sued for any physical injury resulting from the breach of contract, and that if the breach of contract were the result of negligence a third party also ought to have an action in tort.

Case 5. *A* is not the owner but the tenant of the house. His landlord, *L*, has covenanted to do repairs. *L* has not been notified by *A* of any defect. The rule is that the landlord is not expected to keep his eye on premises not in his occupation in order to discover defects. This must be done by *A*, the tenant. If the landlord has not been notified of the defect, he is not liable to *A*.[54] As Mr. L. A. Blundell puts it, "the giving of notice to the landlord is a *condition precedent* of the landlord's obligation: until he has received notice of the defect the landlord is in no wise in default, he is guilty of no nonfeasance, upon his covenant."[55] It follows that he is not liable to *B* any more than

[51] At the time of the contract of sale the house was a complete house as it stood, but the vendor agreed to construct an additional room on the attic floor. The defect complained of had nothing to do with this additional room.

[52] [1937] 4 All E.R. 390, following *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

[53] *Aliter* if the duty of the vendor under the contract to do further constructional work is confined to a specific part of the building, and the defect complained of has nothing to do with that part: *cp.* note 51.

[54] *Makin* v. *Watkinson* (1870), L.R. 6 Ex. 25; *Torrens* v. *Walker*, [1906] 2 Ch. 166; *Griffin* v. *Pillet*, [1926] 1 K.B. 17; *Morgan* v. *Liverpool Corp.*, [1927] 2 K.B. 131. See L. A. Blundell in (1941), 5 The Conveyancer 166–7.

[55] *Op. cit.* at 166.

he is liable to *A*. On the other hand *A* will be liable to *B*, his invitee, under *Indermaur* v. *Dames*, if *A* knew or ought to have known of the defect, and was careless in not taking steps to get it put right or to provide for *B*'s safety by warning him.

Case 6. As in Case 5, save that *L* has been notified of the defect and has allowed a reasonable time to elapse without doing anything. The rule is that although *L* may be liable to *A* for breach of contract, he is not liable to *B* in tort. This was the second point decided in *Cavalier* v. *Pope*,[56] and the House of Lords is of course not free to reconsider it. In any case, however, it seems to be correct on principle,[57] and is indeed precisely the same rule as in Case 2. The proper course for a tenant who sees that his landlord is not fulfilling his obligations is to do the repairs himself and charge his landlord up with them. If he does not do this, he will himself be liable to his invitee for negligence. There is therefore little chance of an invitee being deprived of a remedy that he ought to have. If the tenant is at fault in not seeing that the repairs are done, the invitee will normally have a remedy against him. If on the other hand the landlord has done the repairs but done them negligently, the invitee will, as we shall see (Case 7), normally have a remedy against the landlord. The real hardship is where the person injured is not an ordinary invitee but is a member of the tenant's immediate family (e.g. a wife or child), as in *Cavalier* v. *Pope*. But the hardship is no greater than in any other case where a wife or child is injured by the negligence of the *paterfamilias*. The hardship arises from two facts: first, the inability of a married woman to sue her husband for personal injuries (section 12 of the Married Women's Property Act, 1882), and second (much more important) the fact that a family usually has a common purse, so that the existence of a nominal cause of action against the breadwinner would not make his dependants any better off than they would otherwise be. Usually it is only if the breadwinner is insured that the question whether a cause of action exists against him by his wife or child

[56] [1906] A.C. 428.

[57] This was Pollock's view. In (1906) 22 L.Q.R. 8 he wrote of *Cavalier* v. *Pope*: "It was rather a hard case, but we think that a contrary decision would have made bad law." In (1907) 23 L.Q.R. 4–5 he added: "No other result was possible; and no system founded on Roman law could, if we mistake not, be more favourable to the plaintiff in such a case than the Common Law." Yet the next year he seems to have become more critical, for in (1908) 24 L.Q.R. 240, commenting on *Cameron* v. *Young*, [1908] A.C. 176, where the House of Lords followed *Cavalier* v. *Pope* on an appeal from Scotland, he wrote: "The case . . . once more reminds us how unsatisfactory is the law on this subject." Perhaps he was here thinking of the first rule in *Cavalier* v. *Pope* rather than the second: see the further quotation from this note of Pollock's above, n. 21.

It may be added that the *Restatement of Torts*, § 357, does not accept the second rule in *Cavalier* v. *Pope*. *Cp.* Harper, *Torts*, § 103.

becomes important. However, insurance is now so common that it affords a strong argument for allowing actions in tort between the spouses. Another desirable reform would be to enact that the duty of the landlord under the Housing Act[58] to keep working-class dwellings fit for habitation shall be a duty owed not only to the tenant but also to all persons lawfully on the premises. At the moment the rule is that the duty is owed only to the tenant.[59] The rule in *Cavalier* v. *Pope* is reasonable only if it is supposed that the tenant is capable of living up to the standard of the law's "reasonable man"—i.e. that he is possessed of sufficient acumen and financial means to get the repairs done (if the landlord does not do so) and reimburse himself afterwards from the landlord. But as a matter of actual fact the tenants who are protected by the Housing Act usually do not possess these qualities, and so it is reasonable to protect the lives and limbs of their families and friends by casting upon the landlord a duty of care towards these other persons. In pursuance of the same object it should be provided that the fact that the plaintiff has continued in the premises after coming to know of the danger shall not in itself be deemed to be contributory negligence or to make the damage too remote.

One or two other points may be made with regard to this second rule in *Cavalier* v. *Pope*. The rule is not applied where the defective part of the premises was retained by the landlord in his own occupation;[60] and in this case it is obvious that there is no duty on the tenant to give him notice of the non-repair.[61] Nor is the rule applied where, although the injury resulted from a defect on the demised premises, the case can be regarded as one of nuisance.[62] Now it can be regarded as one of nuisance only if the plaintiff was not on the demised premises at the time of the injury. The result is that it may make all the difference to a plaintiff who has been injured whether he was injured on the demised premises or on the public highway outside them.[63] In *Wringe* v. *Cohen* (1940),[64] the Court of Appeal held that the rule relating to nuisance applied even to a private nuisance. The Court also held that a landlord who has contracted to repair is

[58] See now s. 2 of the Housing Act, 1936.

[59] *Ryall* v. *Kidwell*, [1914] 3 K.B. 135; *Middleton* v. *Hall* (1913), 108 L.T. 804. Both cases followed *Cavalier* v. *Pope*.

[60] *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K.B. 551; *Bishop* v. *Consolidated London Properties* (1933), 102 L.J.K.B. 257; *Taylor* v. *Liverpool Corporation*, [1939] 3 All E.R. 329.

[61] *Melles* v. *Holme*, [1918] 2 K.B. 100; *Bishop* v. *Consolidated London Properties*, above.

[62] See L. A. Blundell in (1940), 5 The Conveyancer 100 ff.

[63] Cp. *Bromley* v. *Mercer*, [1922] 2 K.B. 126.

[64] [1940] 1 K.B. 229.

liable in nuisance to a third party for non-repair even though he had no notice of the non-repair at the time when the damage occurred. In so holding it is generally agreed that the Court went too far, and that where the defect is part of the demised premises notice of the defect ought to be a condition precedent to the landlord's liability in nuisance as much as it is in negligence.[65]

Case 7. As in Case 5, save that *L* has been notified of the defect and has employed a servant to repair it. The servant repairs it negligently. It is submitted that *L* is liable even to a third party, *B*, who is injured. *Cavalier* v. *Pope* is clearly distinguishable in that there the landlord had done nothing. A dictum in favour of *L*'s liability is that of Greer, L.J., in *Bottomley* v. *Bannister*. "In the present case," he said, "if the landlord instead of doing the work himself before he sold[66] the house, had done it afterwards as a contractor to [*A*], he would have been liable if there was negligence on his part to have installed the . . . boiler without a flue."[67] In its context the dictum clearly means that the landlord would have been liable to *B* as well as to *A*. It may possibly be argued that this is not absolutely in point on the present question, for when he used the word "contractor," Greer, L.J., may have been thinking of a repairer by trade who made a specific contract with the tenant to repair, not of a landlord who was repairing the house in pursuance of his covenant in the lease. But however that may be, it is submitted that there is no good reason for drawing a distinction between the two types of case. Where the tenant leaves the repair to the landlord, and it is performed with apparent competence, the tenant will not himself be liable to an invitee who is injured as a result of the repair being inadequate, for in such circumstances the tenant will not have been negligent. Therefore it is surely proper to give the invitee an action of negligence against the landlord.

The greatest obstacle to the plaintiff's success is the case of *Malone* v. *Laskey* (1907),[68] where the facts, so far as relevant, were as follows. *L* let a house to *T*, who sublet it to a company, whose manager, *A*, resided in it with his wife *B*. In the lavatory of the house was a water tank, which became insecure; and *L*, although not bound to do any repairs, sent his servants to repair it. The work was done negligently and a bracket subsequently

[65] See an excellent discussion of this point by L. A. Blundell in (1940), 5 The Conveyancer 100 ff.

[66] It will be remembered that in *Bottomley* v. *Bannister* the defendant was both landlord and vendor.

[67] [1932] 1 K.B. at 478.

[68] [1907] 2 K.B. 141.

fell on *B* and injured her. It was held by the Court of Appeal that *B* had no action against *L* in negligence.[69] It is not necessary to summarise the judgments;[70] suffice it to say that the reasoning is completely out of date and that if the decision on the point of negligence is still law it is because of the doctrine of precedent and nothing else. It seems, however, that since the decision in *Donoghue* v. *Stevenson* and the extension of the principle of that case in *Haseldine* v. *Daw* to persons who fit fixtures, *Malone* v. *Laskey* must be regarded as overruled on this point.[71] The only possible distinction between *Malone* v. *Laskey* and *Haseldine* v. *Daw* is that in the former the defendant was acting gratuitously whereas in the latter the defendants were acting under a contract, though not a contract with the plaintiff. Yet in *Malone* v. *Laskey* Fletcher Moulton, L.J., said that his decision would have been the same even if the defendant had been acting under a contract with his immediate tenant (*T*). There thus seems to be no middle course between regarding *Malone* v. *Laskey* as overruled and allowing it to play havoc among the new principles developed since *Donoghue* v. *Stevenson*.

Case 8. As in Case 7, save that instead of employing a servant *L* employed a firm of independent contractors to effect the repair, and the repair was carelessly done. It is submitted that these contractors are liable in tort to *B* in the same way as the contractors in Case 1. Cases 2 and 3 could also be paralleled in a similar way.

Summary

(*a*) Generally speaking, on a lease or sale of immovable property there is no implied warranty, condition or representation that the property is reasonably fit for its purpose. Nor is the lessor or vendor under a duty of care to see that it is reasonably fit. There are two established exceptions to this principle, (i) in the case of furnished houses, and (ii) under the Housing Act. Moreover (iii) a lessor is in certain circumstances liable in nuisance to persons who are not on the premises. It is submitted that it is open to any court to create a fourth exception by holding that there is an implied warranty, condition or representation that the lessor or vendor knows of no fact (not discoverable on reasonable inspection by the lessee or purchaser) that makes the premises not reasonably fit for the known purpose of the other party. It

[69] There was also a ruling on the law of nuisance, which is not here relevant.

[70] They are discussed and criticised by Charlesworth, *Negligence*, 189–90.

[71] Yet it was regarded as a subsisting authority by Atkinson, J., in *Otto* v. *Bolton*, [1936] 2 K.B. at 52. It was distinguished in *Cunard* v. *Antifyre, Ltd.* (1932), 49 T.L.R. 184.

is also open to any court to hold that the lessor or vendor is under a duty of care in tort to disclose such defect (whether before or after the lease or sale is made), and that if he breaks this duty he is liable for damage resulting from this breach to the person or to the property of the lessee or purchaser or of third persons lawfully on the premises. It is further submitted that it is open to the House of Lords to create a fifth exception (on the lines of *Donoghue* v. *Stevenson*) by holding that a person who builds on his own land and then leases or sells the land and building is liable in tort for negligence if the building negligently contains a defect that causes damage to the person or to the property of the lessee or purchaser or of third persons. However, the lessor or vendor is not regarded as negligent if he has communicated the defect to the tenant or if he reasonably anticipated that the tenant would perceive it.

(*b*) A person who contracts to build, repair or fit premises or fixtures is liable in tort for negligence if his work negligently contains a defect that causes damage to the person or to the property of the other contracting party or of third persons. It is submitted that it makes no difference that the defendant is also a vendor or lessor of the premises. But once again the defendant is not regarded as negligent merely because his work contains an element of danger to others, if he reasonably anticipated that the danger would be seen and counteracted by another person. Finally, a person who contracts to build, repair or fit premises is not liable in tort for a pure nonfeasance.

GLANVILLE WILLIAMS.

THE ADMINISTRATION OF THE WORKMEN'S COMPENSATION ACTS[1]

I was very interested in Miss Chambers' article on "Some Aspects of Workmen's Compensation." There are one or two comments I should like to make. I do not think that the attack on Insurance Companies is altogether fair. Insurance companies are very jealous of their reputation and do not permit their staffs to take actions that bring discredit on them: there have probably been a number of instances where unfair advantage has been taken, but I am afraid undue prominence has been given to these cases. Against this it must be remembered that there are "black sheep" amongst workpeople. Not only are there malingerers but also those suffering from "compensitis" the only cure for which is a lump sum payment.

[1] The author has had practical experience of insurance work in workmen's cases.

In practice it is extremely difficult to satisfy a Court that the alleged disabilities are not genuine, and that is why more cases are not contested. I know from personal experience countless cases where a man has contended that he will never be able to resume his pre-accident work, yet once the settlement is concluded, he is back at his employer's premises asking for his old job again. This occurs even in cases where a man has gone into the witness box to testify of his inability to do his old work and has medical witnesses to support him.

On page 116, reference is made to a case which was settled for £20 and no agreement was recorded—and then follows the statement "nothing more could be done." This is incorrect—as the agreement was invalid it was of no effect whatsoever. The woman was entitled to start arbitration proceedings for the payment of compensation. If liability was established the compensation would have been awarded as from the commencement of incapacity. In such cases the Arbitrator usually rules that the previous payment is not to be taken into consideration—thus the £20 would have been wasted.

From my experience, nowadays all settlements presented to the County Court are closely examined by the Registrar. I think I am correct in saying that Registrars have been instructed to see the workman in every case. An inquiry is usually held in the Registrar's private room, and up-to-date medical evidence is invariably called for. If there is any doubt, the case is referred to the Medical Referee and the Registrar is guided by his report.

I note that Miss Chambers refers to the defence of common employment as being a bar to a claim for damages, but I think it is most unsatisfactory that in some cases an injured workman may recover Common Law damages, and yet in others only be entitled to the limited benefits of the Workmen's Compensation Acts. The basis of a successful claim for damages nowadays is frequently a technical breach of the Factory Act, 1937 (this imposes a very high standard of guarding for all machinery, etc.), and in this case the workman receives a sum perhaps four or five times as great as he would be entitled to as Workmen's Compensation Benefits. To me this is manifestly unfair and the most desirable course appears to be to abolish a workman's right to claim damages at Common Law for occupational injuries, and to introduce a scheme granting increased benefits for all occupational injuries.

Of course, I cannot speak as to injuries sustained by workpeople whose employers are not insured; where the employer is so covered he is bound to give immediate notification of all accidents by the terms of his policy. He does so for his own protection, and where incapacity has resulted, it is quite the usual practice to authorise the payment of compensation without waiting for a formal notification from the injured person of the accident and claim for compensation.

Miss Chambers also refers to the fact that quite a large proportion of workers are not members of a trade union; that may be so, but all workers, even those in the smallest establishments, are members of an Approved Society for National Health Insurance. In the normal way they report *any* absence of work to their Society—if only to explain the absence of stamps on their cards. Nowadays a large number of Societies ascertain full details from their members and then write to the employers asking for an admission of liability and confirmation that compensation is being paid. In practice, Approved Societies and their solicitors handle a large number

of claims on behalf of their members possibly as many as the trade unions.

Although I agree that open Court is probably not the best place for a discussion of Workmen's Compensation disputes, I do not think that the worker's legal position is so disadvantageous as Miss Chambers would have us believe. The Trade Unions, Approved Societies, Poor Man's Lawyer Association, and solicitors acting for workmen employ counsel every inch as capable as those employed by employers or their Insurance Companies. Also the Arbitrator shows the claimant every consideration and presumably makes allowance for his inexperience in legal procedure and strangeness of his surroundings. A study of recent decisions will show that in all possible circumstances the Courts interpret the wording of the Acts in favour of the workman. This particularly applies to the phrase "arising out of and in the course of." One example of this—if a man is suffering from an advanced chronic disease and collapses at work and dies, it is invariably held that his employer is liable to pay compensation, although the man did not meet with an accident in the usually accepted sense of the word. This means that the full amount is payable—the same as in a straightforward accident case—although the man was likely to die at any moment. This trend of judicial decisions is illustrated in the breaches made in the doctrine of common employment by the recent cases of *Wilson & Clyde Coal Co.* v. *English* (1937), *Radcliffe* v. *Ribble Motors* (1938), and *Metcalf* v. *L.P.T.B.* (1939).

So far as the "commercial" aspect of the matter is concerned, it must be remembered that the Insurance Companies who are members of the Accident Offices Association have entered into an agreement with the Home Office whereby (at the present time) 65 per cent of the premiums received is paid out in claims. If the ratio is less than 65 per cent a refund of the difference has to be made. This arrangement automatically restricts profits. The collated figures for the Workmen's Compensation business of Insurance Companies for the year 1940 show an average profit ratio of approximately $2\frac{1}{2}$ per cent after allowing for the special position of one mutual company; this cannot be said to be excessive.

During 1937 and 1938 the Labour Party twice introduced a Bill in Parliament outlining a scheme of State Workmen's Compensation Insurance. I believe similar schemes are in operation in New Zealand and in one of the Canadian States, but rather extraordinarily the Labour Party spokesmen gave no information as to the merit or success of these schemes —nor have I been able to read anything about them.

In cases of doubtful liability, it is the practice of Insurance Companies to make a compromise agreement. This practice has been recognised by the legislature and by virtue of the provisions of 524 of the Workmen's Compensation Act, 1925, such agreements are sent to the Court for approval and recording in the same manner as cases where liability is clear and admitted. I think this has proved beneficial, and if any State scheme is introduced, this aspect of the matter will have to be considered, as it is well known that State schemes tend to be very rigid in their operation and make no provision for marginal cases.

War pensions are one illustration, and in this connection it is interesting to note that under the terms of the Personal Injuries (Emergency Provisions) Scheme relating to war injuries to civilians, compensation is only payable in respect of *physical* injuries. This, I believe, is a new departure, and rules out all claims for disability arising out of mental shock. Much

hardship must arise from any such provision, which to me appears to be a retrograde step.

In conclusion I think a number of Miss Chambers' criticisms are directed to a state of affairs which was probably far more prevalent fifteen or twenty years ago than it is now. There has been much progress, and we can look forward to further great improvements in the period of post-war reconstruction—with increased benefits and greater protection for the workers.

L. E. Hammond.

THE EFFECT OF CHANGES OF SOVEREIGNTY UPON NATIONALITY

The important decision of a Divisional Court (Lord Caldecote, C.J., Humphreys and Singleton, JJ.) in *Murray* v. *Parkes* (1942), 1 All E.R. 558, primarily raises the constitutional problem of Anglo-Irish relations. To comment on that part of the case must be the privilege of the trained constitutional lawyer. The case, however, also involves some narrower aspects, and it is on these that one who is in no way qualified, nor intends, to trespass upon those large issues, may perhaps venture to offer some observations.

The appellant, Michael Murray, was born in 1908 in that part of Ireland which is now known as Eire. He had lived in England since 1934, but was domiciled in Eire. In 1941 he refused to submit himself to medical examination under the National Service (Armed Forces) Act, 1939, on the ground that he was not a British subject but a citizen of Eire. He appeared before a magistrate, was convicted, and his appeal by way of case stated failed. It was agreed that by virtue of Art. 3 (First Schedule) of the Irish Free State Constitution Act, 1922, the appellant was a citizen of the Irish Free State, but the Court held that nothing had occurred that resulted in the loss of his wider British nationality.[1]

1. After having explained that no enactment had given the Irish Free State the right to secede from the British Commonwealth of Nations, and that, moreover, the Government of Eire had never purported to exercise any such right, Lord Caldecote proceeded to indicate with diffidence that, if the international validity of any secession of Eire depended on recognition by the United Kingdom, he could not find it to have been granted either by the Eire (Confirmation of Agreements) Act, 1938, or by the agreements scheduled thereto. Similarly, Singleton, J., shortly reviewed the legislation of 1938, but failed to find anything to prove that "the government which was set up in that part of Ireland which was formerly the Irish Free State, has been recognised by H.M. Government as a sovereign, independent, democratic state." Now the point which is remarkable for present purposes is that the Court, however guarded its language was, even ventured to touch upon the question of whether or not in fact the United Kingdom had recognised Eire as a sovereign independent state. In the words of Lord Finlay in *Duff Development C.* v.

[1] In the same sense Keith, *The Governments of the British Empire* (1935), pp. 121, 122; *Journal of Comparative Legislation, XVII* (1935), pp. 115, 116.

v. *Kelantan Government*,[2] "it has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government and that in any such matter it is bound to act on the information given to them by the proper department." It is difficult to understand why resort was not had to this course which would have saved the Court from much embarrassment. In the absence of any discussion of the point it cannot be assumed that the Court intended to depart from that rule and to revert to the method of independent investigation which for the last time was adopted by Sir Robert Phillimore in *The Charkieh*[3] but which has failed to reappear ever since that case was disapproved in *Mighell* v. *Sultan of Johore*.[4]

2. Assuming, however, that Eire has effected a complete secession from the United Kingdom and the British Empire and is recognised as an independent sovereign state, did the appellant lose his "wider British nationality"? He contended for an affirmative answer on the ground that secession must have the same consequences in respect of nationality as cession (which is clearly right and was accepted by the Court) and that, according to well-established principles, on the cession of British territory British nationality is lost not only by such persons as are inhabitants of, but also by those domiciled in the ceded territory.

For more than two centuries it had been thought that the principle of permanent allegiance as laid down in *Calvin's* case[5] involved the rule that, just as those born in Scotland before the union of the Crowns of England and Scotland remained aliens because they were born aliens, so persons born before a cession of territory remained subjects because they were born subjects, although they might simultaneously owe allegiance to the sovereign to whom such territory has passed.[6] In the early nineteenth century, however, it became well established that the inhabitants of ceded British territory lose British nationality.[7] This rule did not assist the appellant, since Lord Caldecote, as well as Humphreys, J., who relied on this ground only, and Singleton, J., who advanced it as a subsidiary one, were by the special case bound to hold that at the date of the suggested severance the appellant was ordinarily resident in England and therefore not an "inhabitant" of the ceded territory.

Did it, then, matter that at the material date the appellant was undeniably domiciled in Eire? Lord Caldecote and Humphreys, J., were emphatically of the opinion that the question of domicil is irrelevant to the consideration of an individual's nationality. Speaking generally, this is undoubtedly true, and ever since *Udny* v. *Udny*[8] the distinction between nationality and domicil has become a truism which the humblest student would not dare to overlook. But the case of the cession of territory is a peculiar one, because it is here, and probably here only, that nationality is admittedly determined by a territorial test. If in this case allegiance is

[2] 1924, A.C. 797, 813.
[3] (1873) L.R. 4 A. & E. 59.
[4] (1894), 1 Q.B. 149.
[5] (1609) 7 Co. Rep. 1.
[6] See Holdsworth, *History of English Law, IX* (1926), pp. 84–87; Forsyth, *Leading Cases*, pp. 257 *sqq.*
[7] *Doe d. Thomas* v. *Acklam* (1824), 2 B. & C. 779; *Doe d. Auchmuty* v. *Mulcaster* (1826), 5 B. & C. 771. The doctrine of these cases, arising out of the American Declaration of Independence, is identical with that prevailing in America: *M'Ilvaine* v. *Coxe's Lessee* (1808), 4 Cranch 209; *Shanks* v. *Dupont* (1830), 3 Peters 242; *Inglis* v. *Sailor's Snug Harbour* (1830), 3 Peters 99.
[8] (1869) L.R. 1 Sc. & Div. 441.

determined by a territorial test, there is no *a priori* reason why it should be provided by residence rather than by domicil, and it is *nihil ad rem* to point to the distinction between the two conceptions. There is, however, no authority to be found in the books which would support the materiality of domicil.[9] The real reason why residence rather than domicil is decisive, is probably provided by the principle that a change of nationality should be suffered by those who are within the jurisdiction of the new sovereign, and jurisdiction within the accepted meaning of public international law extends to residents, not to those who in the peculiar sense of English law are domiciled in the territory.[10]

3. Another noteworthy point arises from the judgment of Singleton, J. He derived from *Doe d. Thomas* v. *Acklam* and *Doe d. Auchmuty* v. *Mulcaster, ubi supra,* the rule that the inhabitants of ceded territory have a right to elect: "It is clear that cession of territory of itself does not rob a person of his status as a British subject. On cession he still has the right to elect what he will do."

This statement, by its emphasis on the subjective element, might perhaps be understood as involving the result that, provided the intention of exercising the right of election was expressed in any shape or form, a person residing and continuing to reside in the ceded territory could remain a British subject while a person remaining in England after the cession could become a citizen of the ceded state. It is, however, more likely that Singleton, J., did not intend to propound this subjective theory *stricto sensu,* but merely desired to emphasise that a person leaving the ceded or annexed territory after its transfer, may by *such change of residence* elect to remain subject to the former sovereign. Such a qualified "right of election" is not without support in this country,[11] but in view of the decision in *Isaacson* v. *Durant*[12] it is doubtful whether it is possible to speak of the existence of any doctrine of election at all. The question in that case was whether a person resident in this country and born in Hanover at a time when the Crowns of both England and Hanover were held by William IV, became upon the dissolution of the personal union by the death of William IV a citizen of Hanover and an alien or remained a British subject. The Court decided in the former sense on the ground that the claimant owed allegiance to the King in his capacity as King of Hanover and therefore, after William IV's death, continued to owe allegiance to the succeeding King of Hanover. In the course of the argument counsel contended that "in all cases where conflicting duties of allegiance arise, the subject has by general law, law which has been adopted into English law, a right of election of which sovereign he will become a subject." After a full review of the authorities, Lord Coleridge, delivering the opinion of the Court, rejected this view and said that all the earlier cases rested on the objective fact of residence.

[9] See Dicey (-Keith), *Conflict of Laws,* 5th ed., pp. 159, 173; Westlake, *Private International Law,* 7th ed., p. 377.

[10] See Oppenheim (-Lauterpacht), *International Law,* 5th ed., p. 266.

[11] See Edwards, "Common Law Naturalisation and Expatriation," *Journal of Comparative Legislation, XV* (1915), 108, 110. The author of this excellent article says that, while the authorities do not recognise an option in the usual sense, for the exercise of such option as there exists the tendency is to require "evidence more of deeds than of words." Similarly, Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp. 73 *sqq.*, with a full review of the authorities.

[12] (1886), 17 Q.B.D. 54.

The American authorities on the point are equally inconclusive. *Inglis* v. *Sailor's Snug Harbour*[13] dealt with the question whether a native of New York who remained there after the Declaration of Independence in 1776 (which is the decisive date under American law) and returned to England only in 1783 upon the recognition of American independence, had remained a British subject. The Court recognised the right of election and said that the only difficulty was "to determine the time when the election should be made." The Court held that "every act that could be done to signify the choice that had been made except actually withdrawing from the country was done by Charles Inglis," who had thus retained British nationality. In *Boyd* v. *Thayer*,[14] Chief Justice Fuller *obiter* referred to the inhabitants' "right of election . . . to retain their former nationality by removal or otherwise as may be provided." And Halleck says:[15]

> "If [the inhabitants] remain in the territory after its transfer, they are deemed to have elected to become its subjects and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty."

4. The Anglo-American rules relating to the acquisition and loss of British nationality in the event of changes of sovereignty may not only be expected to be in accord with, but are also a source, or at least evidence,[15a] of the rules of international law dealing generally with the effect of such changes upon nationality. It is therefore permissible and necessary to view *Murray* v. *Parkes* against the background of those rules of international law and to ascertain whether it contributes towards their clarification.

The effect of a change of sovereignty upon nationality has of old engaged the attention of international practice and theory.[16] The modern rule of customary international law may be formulated as follows: The nationality of the predecessor state is lost and that of the successor state is acquired by such inhabitants of the ceded or annexed territory as were subjects of the superseded sovereign. While the exclusion of foreigners is self-evident,[17] the other ingredients of the rule require some comment.

(*a*) According to the statement of the rule it is immaterial whether

[13] (1830), 3 Peters 99; see note 7 above, and Moore, *International Law Digest, III*, 289 *sqq.*

[14] (1892), 143 U.S. 135, 162, 163.

[15] 1st ed., p. 819; 4th ed., Vol. II, pp. 505, 506.

[15a] See Oppenheim (-Lauterpacht), p. 29.

[16] See generally Halleck, *International Law*, 1st ed., pp. 816 *sqq.*; 4th ed., Vol. II, pp. 502 *sqq.*; Westlake, *International Law*, Part I (1904), 69 *sqq.*; Keith, *The Theory of State Succession* (1907), pp. 42 *sqq.*; Phillipson, *Termination of War* (1916), 35; Hall (-Higgins), *International Law* (1924), 685; Wheaton (-Keith), *International Law* (1929), 76; Oppenheim (-Lauterpacht), *l.c.* 434, 451; Fauchille, *Droit Public International* (1922), I, 856; Audinet, *Répertoire de dr. int. I*, 567 *sqq.*, with very rich documentation; Niboyet, *Manuel de dr. int. pr.* (1928), pp. 253 *sqq.*, and *Traité de dr. int. privé français* (1938), *I*, 135 *sqq.*, 324 *sqq.*; Von Bar, *The Theory and Practice of Private International Law* (translation, Gillespie, 1892), pp. 181 *sqq.*; Liszt (-Fleischmann), *Völkerrecht* (1925), pp. 151 *sqq.*; Alfred von Verdross, *Völkerrecht* (1937), p. 241; Pillet, *Traité Pratique de dr. int. privé I* (1923), 259 *sqq.*

[17] It is expressly asserted by the award dated the 12th August, 1876, of Mr. Thornton, umpire, in *Masson* v. *Mexico*, Moore, *International Arbitrations III*, 2542; Roumanian-German Mixed Tribunal, 6th November, 1924, *Annual Digest*, 1923–1924, No. 120 (*Wildermann* v. *Stinnes*); Edwards, *l.c.p.* 110; Oppenheim (-Lauterpacht), p. 434, and many others.

the change of sovereignty is brought about by conquest and annexation, cession or secession, and whether it results in extinction or dismemberment of the predecessor state. Hall (Higgins)[18] and others[19] suggest that a distinction must be made between the case of a "wholly conquered" and that of a "partially conquered state," and that in the former all subjects become subjects of the successor state, while in the latter only such subjects suffer a change of nationality as "are identified with the conquered territory at the time when the conquest is definitely effected." The practical effect of this distinction makes itself felt in so far as non-resident subjects of the extinguished state are concerned. It is obvious that they lose their nationality and *prima facie*, therefore, they become stateless. It is this result which those contending for the distinction desire to avoid. But it is a result which is not only supported by the numerous decisions of Courts making residence the test,[20] but which is also logically inevitable; for unless there is a treaty between the two states dealing with the question (an eventuality with which we are not here concerned), the successor state has no jurisdiction over persons who are not resident in the territory, and cannot therefore impose its nationality upon them. There is thus no justification for the suggested distinction.

(*b*) Inhabitants change their nationality automatically. In the first place this involves the proposition that in the eyes of international law inhabitants acquire the nationality of the successor state, irrespective of whether or not its municipal law makes them citizens.[21] Secondly, the statement implies that, in the absence of special provisions by treaties, customary international law does not recognise an option to elect.[22] The many cases dealing with the complicated provisions of the treaties made after the last war[23] are therefore of little value for the elucidation of the customary rule of international law. It is, however, doubtful whether the rule requires qualification so as to exempt those inhabitants from the change of nationality who within a reasonable time after the cession or annexation leave the territory. The American and, perhaps, the English practice referred to above would appear to indicate an affirmative answer; moreover, Pothier[24] has said that "les habitants d'un pays démembré de la France peuvent conserver la qualité et les droits de citoyen en venant s'établir dans une autre province de la domination française." Yet it seems uncertain whether this view "has the hallmarks of general assent and reciprocity"[25] so as to express an accepted rule of international conduct, and logically the conclusion[26] seems inevitable that individuals

[18] p. 686.

[19] Art. 18 of the Draft Convention on Nationality prepared by the Harvard Law School's Research on International Law (*Special Supplement to the American Journal of International Law*, April, 1929—hereinafter referred to as Harvard Research); Audinet, *l.c.* Nos. 397 and 398; Von Verdross, *l.c.*

[20] See below, notes 31, 35.

[21] See, *e.g.* Oppenheim (-Lauterpacht), *l.c.* pp. 434, 451, or Audinet, l.c, No. 391, or Halleck, *l.c.*; indeed, only Von Verdross takes the view that the question must be answered by municipal law.

[22] See Art. 18 of the Harvard Research's Draft Convention; Kuncz, Rec. 31 (1930), p. 117; Oppenheim (-Lauterpacht), p. 434.

[23] They are summarised by Gettys, *American Journal of International Law*, 1927, 268.

[24] *Traité de Personnes, Tit. III*, Section 1.

[25] Language of Lord Macmillan in *The Cristina*, 1938, A.C. 485, 497.

[26] It is drawn by Oppenheim (-Lauterpacht), *l.c.* p. 452. But Art. 18 of the Harvard Law School's Draft Convention proposes to generalise the American rule, at least in the case of dismemberment.

who leave the territory after cession or annexation, do so at a time when they have already come under the sway of the successor state so that they have become its subjects and cannot, in the absence of municipal legislation, alter their status by emigration.

(c) The most serious difficulty relates to the definition of the class of persons whose nationality changes.

Continental theory and diplomatic practice has suggested at least four tests:[27] A change of nationality is suffered by those subjects who are (1) born in or natives of the territory (irrespective of residence); (2) born and resident in the territory; (3) either born or resident there; (4) resident in the territory irrespective of birth. The first of these solutions was adopted by the Prussian Courts in the well-known case of Count Platen[28] and has often since been applied.[29] Yet in modern times the decision in Count Platen's case has become discredited[30] and the tendency seems to be to favour the fourth solution according to which the new sovereign's nationality is acquired by residents or inhabitants, or "domiciliés,"[31] a term which, it should be remembered, is very different from the English conception of domicil and merely connotes ordinary residence.[32]

Although there are some English[33] and American[34] decisions which seem to attach weight to birth rather than residence in the territory, there cannot be any doubt that it is an established Anglo-American rule that a change of nationality is suffered by "inhabitants."[35] A person is regarded as an inhabitant, if he or she is ordinarily resident or permanently settled

[27] See Fauchille, Audinet, or Niboyet, above note 16.

[28] On which see *e.g.* Oppenheim (-Lauterpacht), p. 452, note 2.

[29] *French Cass. Crim.*, 12th June, 1874, Clunet, 1875, 191; see also *Trib. Civil de la Seine*, 12th November, 1892, Clunet, 1893, 563, and *Cass. Req.*, 3rd December, 1907, Clunet, 1908, 824; Polish Supreme Court, 14th August, 1923, *Annual Digest*, 1923–1924, No. 125; Rumanian-German Mixed Tribunal, 6th November, 1924, *ibidem*, No. 120 (*Wildermann* v. *Stinnes*); Egyptian Mixed Court of Appeal, 28th April, 1925, *Annual Digest*, 1925–1926, p. 266, although in another case the Court held that where only part of a state is annexed, non-resident natives do not acquire the new sovereign's nationality, so that Cypriots resident outside Cyprus continued to be Ottoman subjects after Great Britain had annexed Cyprus in 1914; 21st January, 1920, *Annual Digest*, 1919–1920, No. 136. See also Rivier, *Principes de Droit de Gens* (1896), II, 438: "Les régnicoles du pays conquis deviennent régnicoles de l'Etat conquérant."

[30] See Schönborn in Strupp's *Wörterbuch des Völkerrechts, II*, 271; but Von Verdross *l.c.* approves the decision.

[31] German-Yugoslav Mixed Tribunal, 18th September, 1922, *Annual Digest*, 1923–1924, No. 121 (*Peinitsch* v. *German State*); Weiss, *Manuel d. dr. int. pr.*, p. 162; Liszt (-Fleischmann), *l.c.* p. 152; Audinet, *l.c.* No. 400. In France it has been repeatedly decided that "domiciliés" lose their former nationality even if they are not "originaires": see, *e.g. Cass. Crim.*, 7th December, 1883, D. 1884, 1. 209; *Trib. de la Seine*, 8th April, 1938, Clunet, 1939, 92, which relies on an interesting passage from Pothier.

[32] It is unfortunate that it has sometimes been too literally adapted to the English language: see, *e.g.* Oppenheim (-Lauterpacht), pp. 434, 451.

[33] *Donegani* v. *Donegani* (1835), 3 Knapp 63, 85, refers to "natives," but probably the term is used merely as an equivalent of "inhabitants." The same applies to *Shanks* v. *Dupont* (1830), 3 Peters 242.

[34] In *Tobin* v. *Walkinshaw* (1856), 1 McAlister 186, Fed. Case No. 14070 (quoted by the Harvard Research, p. 62) the Court held that a *naturalised* Mexican citizen resident in California at the time of its annexation to the United States was not a "native" of Mexico and therefore did not acquire American nationality.

[35] *Campbell* v. *Hall* (1774), 20 St.Tr. 323, per Lord Mansfield, and many other cases mentioned by Dicey (-Keith), p. 160, or Edwards, *l.c.* p. 110; *Boyd* v. *Thayer* (1892), 143 U.S. 135, 162, 163, per Fuller, C.J.; Halleck, *l.c.*; Wheaton (-Keith), p. 76, and many others.

in the ceded or annexed territory,[36] so that on the one hand a mere traveller or visitor has too fleeting a residence to be regarded as an inhabitant,[37] and, on the other hand, domicil in the strict sense of English law is neither necessary nor sufficient.[38]

In *Murray* v. *Parkes, ubi supra,* the Court disapproved of the contention that the appellant had acquired Irish and lost British nationality merely because he was born and domiciled in Eire. It is for this reason that the decision has significance for international law in general. It strengthens the modern tendency of exempting those who are natives of or who are domiciled in, but not residents of the territory, from the change of nationality.

This problem of international law recently acquired considerable practical importance when Germany invaded Austria. On that occasion it was contended that Austrian subjects who at the material date were not resident in Austria and, of course, did not return there or submit themselves to the new sovereign, did not acquire German nationality, but became stateless. The Home Office, however, did not accept this view, which, it is submitted, may derive support from the implications of the Divisional Court's decision.

F. A. Mann.

[36] Art. 22 of the Harvard Law School's Draft Convention speaks of "habitual residence." Humphreys, J., said in *Murray* v. *Parkes, ubi supra,* at p. 562: "The word 'inhabitants' in this connexion must receive its ordinary meaning—namely, the people residing in the territory lost to the Crown, or, to use the expression of Abbott, C.J., in *Doe d. Thomas* v. *Acklam,* 'the people composing the state.'" Hall (-Higgins), *l.c.,* speaks of those "identified with the conquered territory," a vague and unsatisfactory expression.

[37] Edwards, *l.c.* p. 110; Liszt (-Fleischmann), p. 152.

[38] The view which makes residence the exclusive test deserves approval, because it is in harmony with the general conception of jurisdiction as understood by public international law: see above note 10.

STATUTES

The Personal Injuries (Civilians) Scheme, 1941

In the last war 280 tons of German bombs killed and wounded some 4,500 people on British soil.[1] Future improvements make these figures seem puny, but it was not then possible to experience the complacency that the greater suffering tends to have for the less. Charities, organised in the Prince of Wales Fund, drew widespread support, and were supplemented by Exchequer grants by way of relief. But the demands for a comprehensive Government compensation or insurance scheme were blanketed with assurances that "Germany was going to pay to the last farthing." Claims, due to mature on the day of just retribution, were filed with the Foreign Claims Office. Restitution "for all damage done to the civilian population" was provided for by Art. 232 of the Versailles Treaty. The bill came to more than £36 millions.[2] For each loss of civilian life an average sum of £1,462 was claimed, based on the capitalised value of the pensions supposed to be granted.[3] The Civilian War Claimants'

[1] *The Times History of the War,* Vol. 19, p. 259.
[2] Reparation Commission Report, Appdx. VII.
[3] Report of the Mixed Claims Commission, U.S. and Germany, p. 206.

Association maintains that in Folkestone one permanent pension of £12 a year was actually granted, and that it was a similar story in other places. A decade's sordid bickering closed with *Civilian War Claimants' Association* v. *R.*[4] which gave the *coup de grâce* to the last hope for adequate compensation. All of which went to show that in law, at any rate, the distinction between a government and its people was not in doubt.

The present Scheme,[5] said to be unique in the history of the world,[6] was foreshadowed in January, 1939,[7] together with the broad ideas which would inform it. These ideas are best grasped by a discussion of the Scheme's most important definitions.[8]

Two types of eligible making injury are defined in Art. 2. "War injury" means a physical injury caused by the doing of any injurious act by the enemy, or in combating him, or by the impact of any aircraft, enemy or friendly, or anything dropped from such aircraft. "War service injury" means any physical injury which the Minister certifies to have arisen out of and in the course of the performance by a civil defence volunteer[9] of his duties as such. The distinction is that a war injury may happen to any one, but only as a result of actual war operations; a war service injury can happen only to a civil defence volunteer, but is any injury he suffers in the scope of his employment.

"Volunteer" in the term "civil defence volunteer" is of neutral significance, harking back to the early days of unpaid wardens. The class now includes members of any of the organisations set out in the Schedule to the Scheme. This is noteworthy for its omissions. Ordinary employees of a local authority not engaged by it in the performance of its civil defence functions, or contractors' workmen, are not civil defence volunteers, though injured in demolition work. Nor are members of voluntary salvage squads, who have done excellent service. It is uncertain also whether a member of a civil defence service who is put on other work, say shelter construction during a quiet period, still ranks as a civil defence volunteer while so engaged.

A second pervading distinction is between two sets of compensation rates. There are "injuries which may be compensated on the higher scale," and "other injuries." The higher scale applies to all war service injuries, and those war injuries which are sustained by "gainfully occupied persons." These latter are persons dependent on their work for a living, or normally so dependent, though temporarily unemployed. Persons not gainfully occupied fall to be compensated on a lower scale (unless, of course, they are civil defence volunteers), and will almost certainly belong to one of the following classes: persons living on investments; persons retired on superannuation; old age pensioners; persons so long

[4] [1932] A.C. 14.

[5] S. R. & O., 1941, 226; replacing earlier Schemes of 1939 and 1940. The enabling Act is the Personal Injuries (Emergency Provisions) Act, 1939. The Personal Injuries (Civilians) Regulations, S. R. & O., 1941, 578, contains certain rules of administration and practice.

[6] Such phrases always exaggerate. By the Laws of 26th December, 1914 and 7th April, 1919, the French Government assumed a wide responsibility for civilian injury, and by 1924 had paid some 516 million francs compensation; Report Mixed Claims Commission, *supra*, p. 134.

[7] *Hansard*, Vol. 343, col. 28.

[8] The Scheme employs an extensive jargon, the definition Article 2 running to twenty-five paragraphs and sub-paragraphs.

[9] See below for an explanation of this term. Professor Chorley has drawn the writer's attention to its peculiarities.

unemployed that they have forfeited benefit; and, the largest class of all, housewives.

In its original form, the Scheme made no provision at all for non-gainfully occupied persons, and their admission to compensation, albeit on a lower scale, represents a concession to severe criticism which nearly defeated the whole Scheme.[10] The exclusion was justified by the denial of any inherent claim to compensation in the population at large. Compensation was due for injury suffered in the national service, and national service was ideally defined to include not only civil defence volunteers (for whom some pensions scheme was in any event a necessity), but also all those who, by working in their occupations, were contributing to the national effort (gainfully occupied persons).[11] This covered bookmakers' clerks, but not housewives. Even assuming this reward-for-services-rendered theory of compensation, the framers of the original Scheme seem to have been unaware that in the average household the housewife earns her living by the work she does, which is work of high national importance.[12] Nor, still assuming the theory, should the distinction prevail where the population is, theoretically at least, fully mobilised. However, it should be clear that the war injured civilian deserves better of his country than Public Assistance, and by the admission of non-gainfully occupied persons to compensation, though on lower rates, the reward theory is tacitly and partially abandoned in favour of the more proper basis of State responsibility for individual calamity arising from a national and common danger.

The generic term for the various kinds of payment under the Scheme is "award." There are three heads of award: Injury Allowances (Arts. 6–10); Pensions and Allowances in Respect of Injuries Causing Serious and Prolonged Disablement (Arts. 11–13); and Pensions and Allowances in Respect of Injuries Causing Death (Arts. 14–21).

A. Injury allowances are "temporary and provisional payments" payable weekly or at such other intervals as the Minister may direct, for a period of twenty-six weeks, and only after there has been continuous incapacitation for seven days. In Workmen's Compensation, a right accrues after three days, and it was ungenerous to extend this period. Art. 7 speaks of "incapacity for work." This ambiguous phrase has been a constant source of trouble in Workmen's Compensation,[13] but in a context which includes people who may do no work at all, defies reasonable comprehension. Applied to these people it can mean only "Incapacitated for work if he did work" and the next question is "What kind of work"? A Cabinet Minister's or a professional Rugby player's?

The two basic rates of injury allowance, the higher and the lower scales, are both divided as for married men, unmarried men, and women, and each of these divisions is sub-divided for the case where the injured person is in hospital and the case where he is not. Each division and

[10] *Hansard*, Vol. 352, col. 1253, *et seq.* The Prayer for annullment was lost by 137 votes to 113.

[11] See *Hansard*, Vol. 351, col. 244; Vol. 352, col. 1353.

[12] Perhaps an acquaintance only with the more rarified social atmospheres is to blame. Comparable is the official characterization of families with more than five children as "abnormal"; *Hansard*, Vol. 352, col. 793.

[13] A suggested definition is "Practical inability to do any work or engage in any business which the workman, having regard to his abilities, education, age, and experience, might reasonably hope to undertake presently or at some future time" (Batt, *Master and Servant*, p. 414).

sub-division carries its own rate of award. Unmarried persons under 18 receive half of what would otherwise be the appropriate allowance. National Health Insurance and Unemployment Assistance benefits are taken into account to reduce the injury allowance. It is understood that the normal practice is to withhold these benefits and pay the full injury allowance. A man who has married since the date of his injury is treated as single. Cases, common after the last war, spring to mind, of affianced soldiers being wounded, subsequently being nevertheless accepted in marriage, and then, when on their return to civilian life they found themselves incapable of working, were held ineligible for pensions in respect of their wives.

By Art. 10 a person to whom an injury allowance on the higher scale has been awarded, may have it increased in respect of dependent children,[14] so long as the child concerned is residing with that person, or that person is contributing to a reasonable extent to its support. Where the injured person is a woman, the increases are payable only if she is not receiving maintenance for the child from an individual liable to contribute to its support, and, if she is a married woman, only if her husband is incapable of self-support or is 65 years old or more. A person is incapable of self-support if he is suffering from a physical or mental infirmity of a permanent or prolonged nature whereby he is rendered so incapable. The curious result of this last provision is that if a married woman who is gainfully occupied is unfortunate enough to be wounded at a time when her husband is ill, but not a permanent invalid, she will receive no allowance under this Scheme in respect of her children. If she is not gainfully occupied, no possibility of an allowance arises in the first instance.

B. Once the twenty-six-week period has passed and not been extended by an exercise of the Minister's discretion, the injury allowance ceases, and further compensation is obtainable only as for serious and prolonged disablement. Unlike the injury allowance rates which are basic, the rates for serious and permanent disablement are maximum, being payable in full only where the degree of disablement is total, and suffering proportionate deductions for lesser degrees of disablement. The degree is assessed by certifying as a percentage the proportion between the condition which has been caused by the injury and the condition of a normal healthy person of the same age and sex, taking the latter condition as 100 per cent. No disablement is serious and permanent which is less than 20 per cent. It follows that a person whose disablement is certified as less than 20 per cent exhausts his means of compensation when his injury allowance determines.

In assessing the degree of disablement, neither the earning capacity of the disabled person in his own or any other occupation, nor the extent to which the disablement has been aggravated by individual factors or extraneous circumstances may be taken into account. The first limitation perpetuates the myth first woven round the subject of "partial incapacity"

[14] A "dependent child" is defined as one born at any time not later than nine months after the material date (i.e. the date of the occurrence of the injury) who is under fifteen years old at that date and who, if born before then, was residing with and maintained by the injured person. It may be: a legitimate child; a child legitimated before the material date; an adopted child; a step-child of an injured man who was married to the child's mother before the material date; an illegitimate child; a child legitimated after the material date. In the last two cases, if the injured person is a man, the child's parents must have been living together as husband and wife, with the father maintaining the mother, for the year preceding the material date; Art. 2 (2) 7.

in Workmen's Compensation. This has it that the degree of incapacity has nothing to do with what is termed "the vagaries of the labour market." Thousands of fully able-bodied men may be unable to find work; the lawyer notwithstanding takes for real what even the economist only dreams about, a free market in perfect equilibrium, and assesses the degree of disablement in an economic vacuum. One limb missing equals 50 per cent disablement or thereabouts. A man and an arm are related to each other mathematically. The second prohibition means that a man already without one limb (an "individual factor or extraneous circumstance") who loses another is treated as antecedently a normal, healthy person. At this point, the useful quantifying fiction of "normality" passes into mere untruth. As common sense and common law recognise, an injury pertains to that individual who suffers it, not to the part of his body which is affected.[15]

The award to the disabled person himself is termed a pension. The maximum pension rates are on two scales—for injuries which may be compensated on the higher scale, and for other injuries. Within these categories, there are lower rates throughout for women and for persons under 18, though a married person under 18 is treated as over that age. Under Art. 11 (3) severe cuts in the pension payable are made when the person concerned is one to whom a pension, or in respect of whom an allowance, is payable out of public funds[16] in respect of the death of any person (not being a pension or allowance payable only in case of need). It is hard to see any reason for this beyond a general Treasury malaise at the idea of paying the same person in two capacities. If a woman civil defence volunteer is in receipt of a Widow's Pension, her pension under this Scheme is cut, though they are paid under different rights, and though the former pension is contributory.

Together with his own pension, a married man who is seriously and permanently disabled, and whose injury is compensatable on the higher scale, may receive an allowance in respect of his wife where he is residing with her, and an equal or lesser allowance, at the Minister's discretion, where he is not so resident, but is contributing to a reasonable extent to her support. Seriously and permanently disabled persons compensatable on the higher scale may also receive allowances in respect of dependent children. These allowances are lower in respect of the children of a man in respect of whose wife an allowance is being paid, and decrease after the first child. Where the injured person is a married woman residing with her husband, she can only obtain allowances for dependent children if both, her husband is in need, and either incapable of self-support or not less than 65 years of age. A provision similar to this has already been commented on in Art. 10, and here the stringency is increased by the necessity for proving need. These provisions are rounded off with a rule that where the weekly value of the contribution which is being made to the maintenance of a child is less than the amount of the allowance awarded in respect of it, the allowance may be proportionately reduced. Presumably this rule was intended to guard against the misuse of children's allowances. Since the average allowance in respect of the child of a 50 per cent disabled person is three shillings a week, anxiety on this score was

[15] Such a principle operates both for and against the advantage of the individual concerned. If *A* negligently injures a limb of *B*'s that was shortly due for amputation, the damages will be reduced.

[16] Defined in Art. 2 (2) 14.

misplaced. The possibilities both of use and misuse of allowances on such a scale are alike limited. Throughout these provisions too, the shadow of a means test is easily seen. It was denied that a means test was to be applied to any part of this Scheme, but how else can need, which is taken into account expressly at various points, and impliedly at others, be determined? And for what other reason does s. 5 of the enabling Act give inquisitorial powers to inquire into earnings?

Review proceedings are best mentioned here, since the head injuries and neurological conditions common in war are apt to have delayed effects and suffer subsequent deteriorations. Art. 34, however, goes well beyond the scope of review as commonly understood. Under it, the Minister may at any time review any award, and if it appears to him that by reason of mistake of fact, change in the condition or circumstances of the person to whom the award was made, *or for any other reason whatsoever*, it is expedient to do so, he may alter the rate of or cancel an award.

C. The pensions and allowances payable on death are all (with one exception)[17] subject to two conditions. First, they arise only in respect of an injury which may be compensated on the higher scale. Secondly, the death must be the "direct" result of the relevant injury. The only guide to the meaning of "direct" is a limitation in Art. 29 that no award is payable in respect of the death of any person where it occurs more than seven years after the date of the injury. This arbitrary limitation resuscitates a provision in the Royal Warrant of 1919. It takes only a small intelligence to realise that death can ensue solely and directly from a war-time injury after a lapse of more than seven years, and only a cursory acquaintance with the facts to know that there were hundreds of such cases after the last war. Four years of sustained criticism led to a modification in 1923, but the rule now re-appears in all its pristine ineptitude.[18] Apart from this, two main problems arise in connection with "direct." The first relates to those cases where pre-existent disease contributes to the ultimate death. In the interpretation of the words "personal injury by accident" in the Workmen's Compensation Acts it has been held in such cases that so long as the employment is a contributory factor in causing the death, this is sufficient.[19] The second relates to those cases where a chain of causes following on the relevant injury, culminates in death. Here, in Workmen's Compensation, the ordinary teleological views of the common law have been applied.[20] It appears that the Minister's views on these problems have vacillated. At the start, there was a fairly wide interpretation. Thus, some claims from men engaged in demolition work who were injured when rickety walls caved in, were accepted,

[17] Under Art. 21 a widow or dependent child may receive a pension if in need solely because the death of the deceased has terminated a pension, superannuation allowance, or other income of which he was in receipt. This applies where death results from an injury *not* compensated on the higher scale.

[18] It appears also in the Royal Warrant of 1939, and there the justification was that "It does not exist though it is there in theory" because any "deserving" case will be considered though outside the seven year limit; *Hansard*, Vol. 352, col. 835. But it is there in print—a substantive provision.

[19] In *Clover Clayton & Co.* v. *Hughes*, [1910] A.C. 242, where a workman ruptured an aneurism in turning a bolt, Lord Loreburn, L.C., said: "It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened." Substitute "injury" for "employment" and "death" for "accident" for the present purposes.

[20] See, e.g., *Dunham* v. *Clare*, [1902] 2 K.B., p. 292, per Collins, M.R.

though injuries to third persons caused by the demolition with the use of explosives of bombed buildings were held not eligible for compensation. A much narrower view now appears to have been adopted, the injury having to be more or less contemporaneous with the explosion.[21] Whatever evidential value a close time relation may have in determining whether an injury is direct, this factor cannot form the basis of a reasoned theory on the subject, and to exaggerate its importance constitutes a mechanistic approach with restriction as its result. Such a policy on the one hand lacks the formal merit of conformity with common law views, while on the other it fails to gain any compensating advantage by intrinsically improving on them.[22] It has, however, obvious administrative advantages in connection with demarcation between the Scheme and the Workmen's Compensation Acts.

Where a man has died within twenty-six weeks of his injury, his widow may be awarded a special temporary allowance for the ten weeks following on his death. The permanent widow's pension is on two scales, being at a higher rate in cases where she is over 40 years old, or has a dependent child, or is incapable of self-support. A widow eligible for a permanent pension who has a dependent child of the deceased husband residing with her or under her control may receive an allowance in respect of that child. As has already been noticed in another connection, the allowance may be reduced where the actual maintenance of the child is costing less than the allowance.

The dependent children of deceased persons may also receive permanent pensions. Where the deceased was a man, such pensions are only awarded if the child is not residing with or under control of the widow, being a widow eligible for a permanent widow's pension; for in the case where they are so resident or in such control, the widow may receive allowances in respect of them. The dependent child of a deceased woman is eligible for pension only where it is not possible to obtain its support from any individual liable.

A parent of a deceased person who is in need arising from the fact that he is at least 65 years old (or she is at least 60 years old) or from some infirmity not of a temporary character, and to whose support the deceased had been regularly contributing during the year immediately preceding the date of his death, is also pensionable. Since, as even the Scheme recognises, death may result directly from the injury at more than an interval of one year, it is difficult to appreciate why the necessary period of contribution should precede the *death*. The very injury culminating in death may have prevented the deceased from rendering support during this period, which should therefore have been related to the *injury*. Where

[21] The writer is indebted to Professor Chorley for this information, though the view expressed thereon is his own.

[22] The Scheme as a whole raises in an acute form an interesting question which space allows only to be presented for consideration. Where there is executive administration of a law couched in terms which have already been the subject of a developed case law, how far is it desirable to adopt the common law interpretation *ex toto*, and how far legitimate to depart from it? No settled policy seems to have been adopted in this instance. Thus, while the common law rules of causation have not been accepted, the case law defining scope of employment has been; a civil defence volunteer killed on his way to report for duty does not suffer injury in the performance of his duty. This ruling was based specifically on the Workmen's Compensation cases; *Hansard*, Vol. 371, col. 545. Both in the one case the departure from and in the other the adherence to settled case law, operate against the interest of the injured party.

there is more than one deceased child in respect of whom a parent is pensionable, only one pension may be awarded; and where two parents are eligible in respect of the same death or deaths, only one pension may be awarded at a slightly increased rate. Two, it seems, must live as cheaply as one.

Orphan brothers and sisters of a deceased person who are in need and to whose support the deceased had been regularly contributing may be awarded pensions which in the aggregate must not exceed ten shillings. If there are four orphans this means a maximum of half-a-crown each a week.

By Art. 33 the Minister may, wherever he considers the circumstances justify it, award a lump sum in lieu of the pensions and allowances raised by serious and permanent disablement or death. There is no indication of the principles of assessment to be adopted.

An outstanding matter of general legal interest in the Scheme is its relation to common law and statutory rights. By s. 3 of the enabling Act, (1) the Workmen's Compensation and Employers' Liability Acts are totally excluded in respect of injuries within the scope of the Scheme; (2) no compensation or damages under any enactment or contract, or at common law, are payable on the ground that the injury was attributable to[23] negligence, nuisance or breach of duty, by any person in the case of a war injury, and by the civil defence volunteer's employer, any person who has any responsibility in connection with his duties, or by any other civil defence volunteer, in the case of a war service injury. The argument in favour of such a provision is that the Scheme raises a national responsibility for civilian injury in war time, which responsibility should be discharged by speedy administrative action, and not be subjected to the dangers, delays and uncertainties of litigation. Workmen's Compensation, in particular, contemplates industrial risks only, and employers and insurance companies have not calculated their liabilities on any other assumption.[24] Regarded practically, the scope of the rights curtailed is less wide than might at first sight appear. Whether any person other than a civil defence volunteer could ever establish that his injury arose in the course of his employment is very doubtful. Where a workman is injured in an accident resulting from a risk to which everyone is subject, but which is not necessarily incident to the performance of his work, or to which he is not by his work abnormally subjected, the accident does not arise out of his employment.[25] In *Knyvett* v. *Wilkinson Bros.*[26] and *Allcock* v. *Rogers*[27] persons in the street in the course of their employment were injured by enemy bombs; held, the injuries did not arise out of the employment. Here, the persons injured were subject to the same risk as any other person in the street. Suppose the workmen had been injured in the same way in an arms factory; would the principle of "locality risk" apply,[28] namely that their employment had brought them to a particular

[23] The unusual words "attributable to" are necessary to avoid a terminological conflict with the definition of "war injury," which is "a physical injury *caused by*, etc." As it is, when read in this connection, "attributable to" denotes the *causa causans*, and "caused by" the *causa sine qua non*.

[24] See *Hansard*, Vol. 351, col. 246.

[25] Per Russell, L.J., in *Lawrence* v. *George Matthews Ltd.* (1928), 21 B. 345.

[26] (1918), 11 B. 50.

[27] (1918), 11 B. 149.

[28] "Locality risk" is discussed fully in *Thom* v. *Sinclair*, [1917] A.C. 127.

place which turned out dangerous? It is submitted that in conditions where indiscriminate bombing prevails, the answer is in the negative. The whole topic is of the Titus-Seius order, and not much is lost by its exclusion. Nor does the definition of war injury lend itself to the creation of common law rights in negligence. The writ will not run against negligent enemy pilots; and there would be very few cases where an action could be successfully prosecuted against a member of friendly armed forces who had acted in the bona fide execution of his duty. Civil defence volunteers injured by the negligence of their fellows would often find themselves baulked by the doctrine of common employment, and, in those civil defence organisations established and maintained directly by the Crown, could proceed in contract only by petition of right, and in tort not at all. Against such a background all the considerable arguments which exist against the abrogation of common law rights assume a less impressive character, and could have been refuted in principle for an overriding collective responsibility, clear, egalitarian, and generous in character, to meet a common hazard. It is unfortunate that, in practice, the Scheme shares none of these desiderata.

In cases falling outside the prohibition of s. 3 (these will be suits by civil defence volunteers against parties other than their employers or fellow volunteers) damages may still be pursued. By Art. 31 (1) where damages or a sum in settlement has been received, any award under the Scheme may be reduced by the weekly value thereof. Art. 31 (2) continues, that where a person refuses or neglects to claim, or takes proceedings to recover, or continues proceedings to recover damages, or accepts a sum in settlement, in respect of an injury for which an award may be made under the Scheme, and the Minister considers his action to be unreasonable, the award may be withheld, cancelled or reduced. The joinder of these two paragraphs should not be allowed to conceal their essential dissimilarity. So long as a restricted sphere of common law action remains open, it is better to have an adjusting provision like Art. 31 (1) than the obscurities and hardships entailed by the alternative possibility of a doctrine of election between remedies. Art. 31 (2), however, is penal.[29] Under it, the Minister constitutes himself compulsory legal adviser to injured civilians, and uses his discretion to grant or withhold awards as a stick to beat them into submission. This is an abuse of discretion. That pressure may be applied for a suit to be commenced or a settlement to be refused is especially ironical when it is remembered that the main justification for excluding common law rights was the professed anxiety to save people from the toils of litigation. In the final analysis, therefore, no common law rights are preserved intact; most are abrogated, and the remainder made dependent on ministerial fiat.

By s. 4 of the Act, an employee who is in receipt of an injury allowance and who would be entitled to sick pay from his employers in respect of the same period of incapacity, is entitled only to the sum by which the sick pay exceeds the allowance.

It is also convenient to notice at this juncture that under Art. 26 of the Scheme where an injury is attributable to the serious negligence or misconduct of the person sustaining it the Minister may withhold, cancel or reduce an award. In Workmen's Compensation the much stronger

[29] This is immediately appreciated if an effort is made to find a judicial or reasonable basis for the amount by which an award is to be *reduced* in the event of non-compliance with the Minister's wish.

phrase "serious and wilful misconduct" is used and is interpreted restrictively. There, too, even serious and wilful misconduct does not oust compensation in cases where the injury results in death or serious and permanent disablement.[30]

Thanks to the energetic activities of the women M.P.s the aspect of the Scheme which has received most public attention is its discrimination between the sexes. Though a good deal might be said on this subject, only the following few observations are ventured. The original exclusion of non-gainfully occupied persons, though not based on sex-discrimination, had this practical effect, since the largest class affected was housewives. These were admitted on lower rates. Cutting across both sets of rates, however, is a second differentiation between men and women. Apart from drawing-room sallies at the expense of the ladies, the only argument made in favour of this difference is that it has always existed in other spheres of social insurance. This argument is typical and would be inconclusive even if the Scheme were a social insurance (which it is not) and arose in different circumstances. The fact is that under it, at a time when women are being conscripted into industry on a large scale, a married woman, whose husband may be in the Forces, finds herself treated unequally with a youth on the next lathe who was injured at the same time. The plea based on the lower average wages of women is bad. The theory underlying this Scheme (though violated in several places) does not properly admit the computation of earnings. Besides, many factors other than loss of earnings enter into an estimate of the damage caused by personal injury. The disfigurement of a woman is normally much more serious for her than it would be for a man.[31] It is true that a theory of abstract sex-equality pushed to an extreme conclusion would mean that a widower should receive a pension for the loss of his wife, a result which would not be justified by social facts as they are. This has been pointed out in support of an argument that the differentiation in rates is justified by the male's responsibility in caring for the family. It is said that equal rates would weaken this responsibility and loosen family ties. This does not explain why an unmarried man should receive more than a woman. It is not a question of sex-equality in the abstract, but of a common sentiment of justice. Good law exists on a plane of well-sprung tension between the facts as they are and as they ought to be, and there is no inconsistency in standing by equal rates for men and women, while at the same time denying a claim in husbands for pensions in respect of their deceased wives.

It is not necessary to be of that school which, when it is a question of executive power, is so ready to confuse the word for the wicked deed, to be alarmed by the kind of discretion which is here made over to the Minister. The wide terms of the article granting review powers and the extraordinary control wielded over the rump of common law rights have already been noted. By Art. 39 (2) where a person to whom or in respect of whom a pension or allowance for serious and permanent disablement or death may be awarded is, in the opinion of the Minister, unworthy of a grant from public funds, the Minister may withhold the award or cause it to be forfeited. Art. 34 exceeds all that has gone before in providing that awards in respect of serious and permanent disablement or death may be granted provisionally, or upon any other basis, and for such period as the Minister thinks fit. There is no appeal to a court of law on any

[30] S. 1 (1) (*b*), Workmen's Compensation Act, 1925.
[31] See note 15 and the sentence to which it relates.

question arising under the Scheme, s. 1 (4) of the Act making the Minister's decision final and conclusive.[32] Some of the discretions will, by their nature, be difficult to administer on a logical principle; all of them have poor material on which to work. Beyond this, however, lies the question whether any but a few of them were necessary at all, subject to court review or not. It is hardly possible to speak of a *right* to compensation arising under the Scheme. Rather, the Scheme sets boundaries and gives signposts in an area within which the Minister may roam at will. No one can accept the sincere and reiterated statements by the Minister of his will to sympathetic administration[33] as any kind of substitute for legal rights. Considering, in particular, the legislation on war damage to property, it must be asked whether there is any valid reason why a war-time injury to an individual in his personality should not receive the same certainty in protection as a similar injury to a property holder in his interest.

The substantive granting provisions of the Scheme are deprived of clarity or precision by the jumble of conditions precedent and restrictions beneath which they are submerged.[34] Rates, which are parsimonious at their best and negligible at their worst,[35] are not even founded on a clear principle. "We have framed the Scheme with regard to war injuries partly on war pensions rates, partly on workmen's compensation rates, and partly on the Ministry of Health insurance scheme rates. That may seem to be rather a muddle. . . ."[36] Ribald comment seems invited. Nor has the opportunity afforded by new problems and a general will for reform[37] been allowed to react on the accumulated experience of the past. Nowhere is this more in evidence than in the matter of children's allowances. At a time when purchasing power was much greater, the B.M.A. considered that 6s. 9d. a week on food alone was the absolute minimum necessary to keep a person in bodily health; Sir John Orr said it was 10s. Under this Scheme, there are different rates for different purposes. The rates of allowance for children of disabled persons vary from 8s. 4d. to 5s. These are maxima, the proportion paid being dependent on the degree of disablement. Pensions to dependent children of deceased persons range from 10s. to 5s. These rates are considerable increases on those in the original Scheme. Actually, it needs more food to keep a young child in health

[32] The only provision in the nature of an appeal (though complete control still remains with the Minister) is that in a case of serious doubt or difficulty arising on the evidence relating to a medical question, the Minister may obtain the opinion of a panel of experts; Art. 24.

[33] Note 17 contains one example of many. The writer's information and a limited experience go to show that in straightforward cases, the award is made quite quickly.

[34] In restricted space it was necessary to concentrate on the substantive clauses, rather than the provisos. Readers of the Scheme will notice many more restrictions than have been mentioned, some very involved. See, *e g.*, the time bars in Art. 17 (4); limitations on funeral allowances granted in Art. 20.

[35] The total pension for orphaned brothers and sisters of deceased persons cannot exceed 10s. Two aged or infirm parents receive 12s. 6d. in respect of the loss of however many supporting children, subject to a 5s. maximum increase at the Minister's discretion in a special case. A widow with three children would receive 42s. 3d. An injured housewife in hospital would receive 9s. 4d.; her unnmarried brother, also in hospital, would receive 24s. 6d., and her married brother, in hospital or out, 35s.

[36] *Hansard*, Vol. 351, col. 266.

[37] Criticism of the Government's war pension schemes is the more impressive in that it is voiced by all shades of opinion.

than it does an adult, and food is only one item in maintenance. Nor does the law seem to find it possible to fix any basic rate at all. "With five departments in the State concerned, there are no fewer than eleven different scales dealing with children's allowances."[38] Finally, a theory of diminishing costs is applied to children after the first, which may be true of mass-produced motor cars, but which every mother can deny applies to her children. This penalisation of large families, an injustice constantly attacked in times of peace, is the less understandable even from a utilitarian standpoint when war drains the nation of its youth. In short, the Scheme hardens and perpetuates principles of pension law demonstrated unsound by the criticism and hard cases of a generation; and adds a few of its own for good measure.[39]

[38] Mr. George Hall, *Hansard*, Vol. 352, col. 1305. If the whole field of social welfare is surveyed, including Government relations with voluntary agencies, the diversity is even more marked.

[39] Since this note was written, pension rates, though not injury allowances, have been increased by about 10 per cent.

MORRIS FINER.

NOTES OF CASES

Administrative Criminal Law

There is an interesting discussion reported in Hansard, 1942, Vol. 377, col. 1847, about the case of a miner who was sentenced to fourteen days' imprisonment by a Sheriff's Court in Scotland for disobeying a direction given by a National Service Officer of the Ministry of Labour and National Service to undertake work in a colliery as a stripper. Such a direction is made under Defence Regulation 58A which confers upon the Minister of Labour and National Service or on any National Service Officer the power to direct any person to perform such services as may be specified or described in the direction, being services which that person is, in the opinion of the Minister or Officer, capable of performing.

The man in question had a long history of accidents as a miner, and had gone into employment of another type. When directed to return to colliery work he contended that he was not fit for it. His objection was supported by a certificate from a medical practitioner. He was then examined by another doctor on behalf of the National Service Officer and certified as fit to work as a stripper. The case was referred to a local appeal board consisting of three laymen which came to the conclusion that the man was in fact fit to work and dismissed his objection. As he still refused to obey the direction he was prosecuted and sentenced.

The interesting and perhaps disturbing point which arises from this discussion is that the Court which dealt with the case had no jurisdiction to examine into the question whether the man was really guilty, in the sense of whether he was really fit to work or not. The function of the Court was simply to decide what, if any, punishment, should be meted out to a man whose guilt had already been adjudicated upon by an administrative tribunal which, as far as appears from the debate in Hansard, came to a decision upon medical certificates (see col. 1802) without having the practitioners who issued the certificates before it for examination and

cross-examination, and against the opinion of an experienced miners' agent to the effect that the man was not fit to work as a miner.

Substantially, therefore, the decision whether or not a man shall go to prison has in such cases been taken out of the hands of the ordinary criminal courts which have no jurisdiction to inquire into the question whether he had reasonable grounds for refusing to obey a direction. It has been entrusted to what may justly be described as an administrative tribunal which can apparently act on documentary evidence of a kind which could not be entertained in an ordinary criminal court. We thus have the beginnings of what may be described as administrative criminal law. Nor is this an isolated case, for as the Lord Advocate pointed out, there are other orders which can be made under Defence Regulations failure to comply with which may lead to a similar result.

The function of the regular Court is in effect reduced to, first, that of ensuring that the administrative tribunal has reached its decision in a regular way and in accordance with the authority conferred upon it, and secondly, that of determining the punishment to be awarded. This may turn out to be an innovation of great importance.

R. S. T. C.

Confessions

R. v. *Hammond*, [1941] 3 All E.R. 318, is an interesting and rather disturbing case. The appellant had been convicted of murder and the grounds of his appeal were that his confession of guilt had been wrongly admitted in evidence in the following circumstances.

The prisoner had made a confession to the police under interrogation, during the course of which he had among other things mentioned the place where he had hidden the money to obtain which he had committed the murder. During the opening of the case for the prosecution it was intimated by the defence that evidence of the confession would be objected to and in due course therefore the question of the admissibility of the evidence as to the confession was decided by the judge in the absence of the jury.

The prisoner in the instant case objected to his confession being given in evidence on the ground that it had been forced out of him by rough treatment. During the course of cross-examination he was asked by counsel for the prosecution whether his confession was in fact true and replied in the affirmative.

The judge admitted the evidence, the jury came back, and the confession, including the affirmation of its truth to counsel, was put in. The prisoner did not himself give evidence and was convicted. He based his appeal on the plea that the question as to whether he was guilty ought never to have been put to him by counsel during the discussion as to admissibility.

Unfortunately the report does not make it clear on what grounds the question was challenged. It rather appears that the argument was that in deciding whether the confession was extracted by violence it was irrelevant to know whether it was true; for the Court of Criminal Appeal, in holding that the question was a proper one, said that it was admissible because "it went to the credit of the person who was giving evidence. If a man says 'I was forced to tell the story, I was made to say this, that, and the other,' it must be relevant to know whether he was made to tell

the truth, or whether he was made to say a number of things which were untrue. In other words, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement."

With respect, this argument appears to be fallacious. If the evidence was wrongly obtained it is quite clear on the authorities that it is inadmissible even if it results in the obtaining of other evidence which goes to prove that it is true (*R.* v. *Lockhart*, 2 East P.C. 658, *R.* v. *Warickshall*, 1 Leach 263). It is obviously very important that this rule should be observed and therefore it appears to me to be logically quite irrelevant to ask the witness whether his confession is true. It will be observed that this is an entirely different kettle of fish from asking a prisoner who is giving evidence on the charge itself whether he did not do the criminal act of which he is accused. It is submitted therefore that this question was in fact irrelevant and ought not to have been admitted.

It is not very easy to follow the argument about the question going to the man's credit. If he had answered "No," the inquiry would not have been further advanced. The fact that he answered "Yes" when his answer practically meant a death sentence would persuade most people that he was so truthful a person that his account of what occurred during the interrogation was to be preferred to that of the police. But if this were so, then the confession itself was inadmissible.

It may nevertheless be contended that even if the confession itself was inadmissible other evidence which came to light as a result of the confession was admissible (see the above cited authorities), and that the answer to this question by prosecuting counsel, even though the question was itself irrelevant, was therefore admissible. This argument is repellant because it punishes a man for being truthful, but there is much to be said for it on the authorities.

The rule which permits evidence to be given of matters which have come to light as a result of a confession has always seemed to me to be entirely illogical and unjust. It is clear on the authorities already cited that if a receiver of stolen goods is induced by wrongful means to make a confession during the course of which he mentions that he has hidden the goods under the floor boards in his house, the police may give evidence that they searched the prisoner's house and found the goods under the floor boards. It is obvious that such evidence would usually lead to a conviction. In other words, the very result has been achieved which the primary rule against wrongfully obtained admissions was designed to prevent. In the instant case the discovery of the money which the prisoner had obtained as a result of his crime might well have had the same effect. And it is indeed clear that the type of detailed confession which is so often produced under the modern police system is more likely than not to lead to the production of secondary but often very cogent evidence of this type. As long as this subrule exists the temptation to the police to exceed permissible bounds and employ Gestapo methods in the conduct of their interrogations is a very real one. It is perhaps too long established for the Court of Criminal Appeal to upset it, but it is highly desirable that the House of Lords should have an opportunity of doing so, as it is both dangerous and unjust.

Further, it seems to me very questionable whether it is desirable to admit in evidence on a criminal charge what transpires during a separate judicial enquiry into the admissibility of a certain item of evidence. The

right of a prisoner to refrain from going into the box was deliberately and jealously safeguarded by the Criminal Evidence Act, 1898, and it is not open to the prosecution to comment upon his failure to do so. If, however, in order to sustain an objection to the admissibility of certain evidence he must go into the box he will thereupon expose himself to a cross-examination which may as in this case lead to his conviction. In other words, the policy of the Criminal Evidence Act in this respect is evaded.

Surely the prisoner ought not to give evidence at this stage at all. His version of what occurred during the interrogation should be put to the police. If the police admit its truth, then the evidence obtained by it is inadmissible. If the police deny its truth, then a jury is the proper tribunal to decide between prisoner and police as to the truth of the prisoner's allegations.

R. S. T. C.

Limitation of Actions—Public Authorities Protection Act

The first section of the Public Authorities Protection Act (now s. 21 of the Limitation Act, 1939) rivals in difficulty of application the troublesome first section of the Workmen's Compensation Act; and in *Griffiths* v. *Smith*, [1941] 1 All E.R. 66, where a question arose upon the former provision, the House of Lords made no effort to lay down a general principle by which all the cases on it could be tested.[1] The speeches delivered are, however, an important guide to what must be its interpretation for the future. The facts were that the plaintiff, the mother of a pupil at a non-provided school, was invited by the headmaster of the school (with the authority of the managers) to attend an exhibition of the pupils' work. While the display was going on the first floor of the school premises collapsed and the plaintiff was injured. It was held by the House of Lords, affirming the trial judge and the Court of Appeal, that (1) the managers of the school, though it was a non-provided one, were a public authority within the protection of the Act, and (2) the act of the managers in authorising the invitation was done in the discharge of a public duty. As to (1), this had already been decided by the Court of Appeal in the earlier case of *Greenwood* v. *Atherton*, [1939] 1 K.B. 388. The nearest authority on the other side of the line was *Ayr* v. *St. Andrews Ambulance Association*, [1918] S.C. 158, where it was held that the Act did not apply to a voluntary charitable institution, though incorporated by Royal Charter. The difference between such an association and the managers in the present case was that the latter were "a statutory organ of a Government department, now the Ministry of Education" (*per* Lord Wright at p. 81). As to (2), the main difficulty was caused by *Bradford Corporation* v. *Myers*, [1916] 1 A.C. 242, where the House had held that a gas company delivering coke under a contract of sale was acting "voluntarily" and so was not within the protection of the Act, even though the company had statutory authority to sell coke. The distinction between that case and the present (if it exists) would appear to be this, that in *Bradford Corporation* v. *Myers* the selling of coke was not an item in the supply of gas, which was the public function of the company, whereas in the present case

[1] For able discussions of these cases, see the monograph by J. J. Somerville, *The Public Authorities Protection Act* (1934), and an article by C. S. Emden in (1923) L.Q.R. 341.

the holding of the exhibition was an item in the management of the school (*per* Lord Wright at pp. 82–3). Nor did it make any difference that the managers were under no duty to continue carrying on the school. The distinction between the two cases is a fine one, and some words of Lord Wright seem to narrow the importance of the restrictive interpretation of the Act adopted in *Bradford Corporation* v. *Myers*, and even to cast a shade of doubt upon it. "Much turned," he thought, "in that case on the sharp antithesis of two operations, the one to supply gas, which was obligatory on the corporation, and the other to sell coke, which was optional. This made it easier to dissever the two operations, though in one sense both might be regarded as falling within the general idea of a gas company's undertaking, which necessarily involved not merely the making and supply of gas, but the disposal of coke and other residual products."

The present decision may well shake the authority of certain earlier cases based on reasoning similar to that in *Myers'* case, such as *Clarke* v. *St. Helens B.C.* (1916), 85 L.J.K.B. 17, and *Hawkes* v. *Torquay Corporation*, [1938] 4 All E.R. 16. Lord Porter's "distinguishing" of the latter case (at pp. 90–1) is not very convincing. G. L. W.

Evidence—Motor Insurance—Road Traffic Act, 1934, s. 10

As ultimately decided in the Court of Appeal the case of *Merchants' and Manufacturers' Insurance Co. Ltd.* v. *Hunt*, [1941] 1 K.B. 295, turns on a point of evidence, but it is one that is of great practical importance in motor-insurance law. The decision, shortly stated, is as follows. When an insurance company brings an action against the insured for a declaration under the Road Traffic Act, 1934, s. 10 (3), that they are entitled to avoid a policy on the ground that it was obtained by non-disclosure or misrepresentation of material facts, and persons injured by the insured within the terms of the policy exercise their right to become defendants in the action by virtue of the proviso to the same sub-section, the insurance company cannot give in evidence against the latter defendants admissions made by the assured, and by the person whom he allowed to drive the vehicle. For the second defendants (the injured parties) are not so identified in interest with the first defendant, the insured, as to make his admissions admissible in evidence against them. The practical effect of this ruling must be, where the insurance company cannot get other evidence of their right to avoid the policy than the admissions of the insured and the driver, to stop what Stable, J., in the court below ([1940] 4 All E.R. at 207) called the "gap" left by the above provision of the Road Traffic Act in the protection of third parties against negligent driving. But one cannot help regretting that the gap was ever left by the legislature.

A subsidiary point decided was that where a person in making a proposal for a policy of insurance answers a question with a simple "yes" or "no," this amounts to an absolute statement of fact and does not imply the qualification "to the best of my knowledge and belief."

In argument before the Court of Appeal counsel for the first defendant started a hare similar to one that has given rise to a good deal of sterile discussion in the law of impossibility of performance. He contended that the duty incumbent on the insured to disclose all, and not to misrepresent any, material facts rested on an implied term in the contract,[1] and therefore

[1] See the authorities collected in Spencer Bower, *Actionable Non-disclosure* (1915), 59–60.

that it was superseded by an express term covering the same ground as (or being inconsistent with) the implied term.[2] On this argument Luxmoore, L.J. 1 (with whom Scott, L.J., agreed on this point) said: "Whatever may be the position with regard to non-disclosure, as to which I say nothing, I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, depends not on any implied term of the contract but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition" (p. 318). Every student of the history of innocent misrepresentation will concur in this remark. With regard to fraudulent misrepresentation the position is even plainer, for it is not permitted to contract out of the law of fraudulent misrepresentation, which in consequence cannot rest on an implied term.[3] The premise in the argument of counsel is therefore plainly unsound, at least as regards the law of misrepresentation. But it is submitted that this need not in itself impugn his conclusion. Whether or not the law of non-disclosure and of innocent misrepresentation rests upon an implied term, it is evident that the parties are able, if they wish, to contract out of it; and whether they have so contracted out of it is a matter of construction that need not be affected by the academic question whether or not the law rests on a so-called "implied" term. G. L. W.

Nuisance and Negligence Again

The cases which demonstrate the impossibility of a clear distinction between Negligence and Nuisance, multiply in a somewhat monotonous fashion. Three more decisions bear on this problem.

Heap v. *Ind Coope & Allsopp, Ltd.*, [1940] 3 All.E.R. 634, a decision of the Court of Appeal, is interesting not so much for its contribution to the law of nuisance as for the robust and refreshing manner in which modern English judges use precedent as a means to an end, namely, to administer justice in the case before them, and sometimes use it pretty freely too. In the present case, the plaintiff was seriously injured through falling into the insufficiently protected cellar flap of a public house, of which P. was the tenant, and the L. Brewery the freeholders. All their shares were held by the defendants, a big brewery exercising effective control under the system of tied houses. They formally rented the public house from the L. Brewery (which they owned) and sub-let it to P. After some inconclusive correspondence with the first two parties, the plaintiff eventually sued the defendants. Lord Justice MacKinnon, speaking for the whole Court, had little patience with technical arguments that the occupier, not the landlord, ought to have been sued.

> "As far as I am concerned, I freely avow that, inasmuch as in common sense and in all decency Heap ought to be able to recover against somebody, and, in the circumstances of this case, and having regard to the correspondence which has taken place, in all common sense and decency he is also to recover against these defendants if the law allows it, my only concern is to see whether, upon the cases, the law does allow him so to recover."

[2] Cp. the similar argument raised and rejected in *Fibrosa Soc. Anon.* v. *Fairbairn, etc., Ltd.*, [1941] 2 All E.R. 300, at 305.

[3] See Spencer Bower, *Actionable Misrepresentation* (1927), 210, 214–215. But an appropriate term in the contract may operate to exclude the fact of deceit: *Ward* v. *Hobbs* (1878), 4 App. Cas. 13.

Applying this principle—which is another sign of the reversal of the purely analytical approach of judges of the positivist era—the learned Lord Justice overcame the difficulty of holding the landlord, not the tenant, liable, in a case where the landlord did not know of the nuisance, by combining the principles of *Wilchick* v. *Marks* (1934), 2 K.B. 5, and of *Wringe* v. *Cohen* (1940), 1 K.B. 229. The former held a landlord, (wealthier, as in the present case, than the impecunious tenant) liable, where he had a right of inspection of the premises for purposes of repair. This was the case here. But the limitation formulated by Goddard, J., in *Wilchick's* case, that it was a necessary proviso that the landlord knew of the nuisance, was, according to Lord Justice MacKinnon, removed by the Court of Appeal in *Wringe* v. *Cohen*. In a previous number (Vol. 3, p. 305 *ssq.*) it was pointed out that the introduction of an apparent principle of strict liability into nuisance was (*a*) not necessary, because it was a case of clear negligence, (*b*) meaningless, insofar as the Court itself excepted cases of latent defect and trespass, which left only cases of negligence, (*c*) of little practical significance, since the border lines between negligence and strict liability, in cases of this type, have been blurred beyond the possibility of a practicable distinction. Of the justice of the decision there can be little doubt. But the theoretical relation between *Wringe* v. *Cohen* and the other authorities on Nuisance (quoted in the note referred to) still requires judicial clarification, not possible, it is respectfully submitted, until the present relation between strict liability and negligence is boldly re-examined.

In *Slater* v. *Worthington Stores*, [1941] 1 AER. 245, the plaintiff was injured by a mass of snow falling upon her from the sloping roof of the defendant's leasehold premises. Between the end of the snowstorms, which had caused the accumulation of snow, and the accident, four days elapsed, during which it was physically possible to remove the snow. Oliver, J., held that the defendants obviously knew of the extraordinary accumulation of snow and did nothing to remove it. This was affirmed by the Court of Appeal, 157 T.L.R. 468. The decision to hold them liable continues the long line of decisions, from *Barker* v. *Herbert* (1911), 2 K.B. 633, to *Sedleigh-Denfield* v. *St. Joseph Soc.* (1940), A.C. 880, which makes liability for nuisance dependent on knowledge or carelessness in failing to take notice of the nuisance. The decision also adds yet another example to the growing number of decisions which cannot, and rightly so, discover any difference between framing the action in nuisance or negligence. The action either fails or succeeds on either ground, as Oliver, J., and Goddard, L.J., expressly stated.

In *Cushing* v. *Walker & Son*, [1941] 2 All.E.R. 93, it was not snow but a slate which fell on the plaintiff and injured the plaintiff. The slate had been loosened by bomb blast, which lifted and then replaced it on the roof, now no longer sufficiently secured. But externally no difference was visible, and, after a careful examination of all the evidence, Hallett, J., found that even if someone had climbed on to the roof to see what had gone wrong, the change could not reasonably have been discovered. The learned Judge apparently found some difficulty in deciding whether, in these circumstances, the defendants were liable. It is a little difficult to follow his reasoning, but the result is that this was a case of continuing nuisance, the defendants therefore were liable only if they knew or ought to have known of the nuisance, and, on the facts, they were not negligent in not discovering the defect caused by the bomb blast. This is in line with the

large number of decisions affirmed by the House of Lords in *Sedleigh-Denfield's* case, and the law would now be tolerably clear on this subject, had it not been somewhat confused by *Wringe* v. *Cohen*.

W. FRIEDMANN.

Landlord's Liability to Tenant's Visitors—Responsibility for Negligence of Independent Contractors—Repairers and the Principle of Donoghue v. Stevenson

The decision of the Court of Appeal in *Haseldine* v. *Daw*, [1941] 3 All E.R. 156, is certainly one of the most interesting in the Law of Tort for some years. It deserves careful study—first because it is likely to become a precedent of some importance in the law regarding the duties of an occupier of premises towards visitors as well as for the development of the principle of *Donoghue* v. *Stevenson*; second because the judgment of Scott, L.J., is full of interesting observations on a branch of the Common Law more in flux than any other.

Quite apart from the legal principles involved the decision is a useful reminder to students how important and, indeed pre-eminent, a part of the lawyer's work consists in the sifting and correct appreciation of facts. In our industrial age that means, to a large extent, an understanding of technical questions. Whether a patent dispute, a Workmen's Compensation case, or a manufacturer's or repairer's negligence is in question, the judge will often be called upon to follow and evaluate some complicated technical or scientific process, and, as long as the questionable procedure of expert witnesses called and paid by the parties is followed, will have to weigh conflicting expert evidence. Perhaps the legal training of the future might take this factor into account. In the present case, the decision turned upon the cause of the breakdown of an ancient hydraulic lift. The plaintiff was travelling in the lift, in order to visit a client, a tenant in the first defendant's (to be referred to as "landlord") block of flats, when the lift started to descend, out of control and with ever-increasing speed, injuring the plaintiff. There is no need to go into the technical details. But the decisive question, about which the Court of Appeal differed from the trial judge, was whether the breakdown was due to the defective mechanical condition of the combination of ram and water cylinder which controlled the hydraulic pressure, or solely to the negligence of an employee of the second defendants (to be referred to as "engineers") in fitting a gland, after one of the periodical tests of inspection and technical supervision which the engineers had, by contract, undertaken to carry out for the landlord. The trial judge had held that a contributory cause of the accident had been the landlord's neglect in not renewing the old rams, despite warnings by the engineers. The Court of Appeal, on the other hand, held that the worn state of the rams did not contribute to the accident which was solely caused by the improper fitting of the gland and the consequent escape of water which reduced the pressure. It is evident that this decision depended upon an appreciation of the technical factors involved.

The first legal question to be decided was whether the landlord was liable. This depended: (*a*) on the nature of his legal relation to the plaintiff; (*b*) on the degree of his responsibility for the negligence of the engineers who were independent contractors.

Scott, L.J., and Goddard, L.J. (Clauson, L.J., agreeing with the latter)

differed on the nature of the relationship. Scott, L.J., thought that the landlord of a block of flats had a business interest in making his staircases and lifts available to persons desiring to visit his tenants, and the exhibition of the lift, one of the "common services," meant an invitation to the visitor to use it. The plaintiff was therefore an invitee of the landlord, and, in his Lordship's opinion, *Fairman's* case (1923), A.C. 74, was not in the way, since the judgments which were commonly understood as fixing a relation of this kind as one of licensor and licensee, were mere dicta and the decision itself rested on the ground that the landlord, even if an invitor, had not been negligent. In support of this interpretation of *Fairman's* case, Scott, L.J., quoted the findings of fact by Shearman, J., and passages from the judgments of Lords Atkinson, Sumner and Wrenbury. Goddard, L.J., thought it impossible to deduce from *Fairman's* case anything but the doctrine, binding upon the Court, that the relation was one of licensor and licensee, though he too would have preferred to consider the visitor as an invitee. The Court was unanimous, however, in dismissing the action against the landlord. For towards a licensee, his duty was merely that of warning against traps known to the landlord, and the Court found that the landlord had no knowledge of the danger to passengers inherent in the condition of the lift. It did not accept Hilbery, J.'s finding that the engineers had warned the landlord of the dangerous condition of the lift and interpreted their suggestions in the last report before the accident as made for the sake of economy, not of safety. Goddard, L.J., also rejected the construction, by Hilbery, J., of the lift conveyance as equivalent to a contract of carriage, implying a higher duty of care. He thought that there was an essential difference between the undertaking of the transport itself, which imposed a duty of care, and the putting of a conveyance at somebody's disposal. The latter was the case here. Scott, L.J., from his point of view, had first to reject the theory, possible because of an ambiguity in the rule in *Indermaur* v. *Dames*, that an occupier might have a duty to make the premises reasonably safe for an invitee. This would put the invitee on the same level as the contractee. But Scott, L.J., stated the alternative theory in an unusual manner, as being a duty "to take reasonable care to ensure that the premises shall be safe" (p. 166). With respect, it has never been suggested, as far as the present author is aware, that the duty towards a contractee goes further than to ensure "that the premises are as safe as reasonable care and skill can make them" (McCardie, J., in *Maclenan* v. *Segar* (1917), 2 K.B. 325). Sir Frederick Pollock's observation on "a limited duty of insurance" (Torts, 14 ed., p. 406), quoted by Scott, L.J., seems to refer to occupiers of buildings in general, regardless of the legal position of the visitor. A practical difference between the two kinds of duty lies, according to prevalent opinion, in the responsibility for independent contractors, which is usually assumed to be included in the implied warranty to a contractee, but not in the lesser duty towards invitees. Apparently Scott, L.J., meant to determine the liability of the landlord on this lower level. Reasonable care to ensure that the premises shall be safe means liability for ordinary negligence excluding liability for independent contractors, and that probably means the same as a duty to warn against dangers of which the occupier knew or ought to have known (*cf.* Prof. Winfield in 58 L.Q.R. 18). Scott, L.J., was unfortunately brief on the question of independent contractors. He contented himself with saying that the landlord, by entrusting a competent firm of lift engineers with the supervision of the lifts, had taken the

kind of care which a reasonably prudent man would take in the circumstances. This, and no more, was the duty of the invitor.

> "To hold him responsible for the misdeeds of his independent contractor, would be to make him ensure the safety of his lift. That duty can only arise out of contract, as in the case of an employer's duty towards his employees, which, in certain cases, may make him responsible for the structural fitness of the premises where they are to work."

The decision of the Court on this point of the legal relation between an occupier of premises and a visitor reveals once more the unsatisfactory state of two important legal problems—the classification of these relations, and the responsibility of an employer for the torts of an independent contractor.

The number of different relationships devised is truly amazing, and the confusion is correspondingly great. The duties of an occupier are supposed to depend on whether the visitor is a contractee, an invitee, a licensee or a trespasser. Added to these are two categories of a very different character—that of persons entering in discharge of a public duty —like the factory inspector or a policeman—and that of private persons entering "as of right," *e.g.* users of a highway, wrongly lumped together with the former in one category (*e.g.* in Salmond, par. 133) since their position is at best as strong as that of licensees. As if this were not enough, the "permittee" has been thrown in (Lord Dunedin in *Excelsior Wire Rope Co.* v. *Callan* (1930), A.C. 411) half way between a licensee and a trespasser, but it seems that this unfortunate figure has soon left the scene. It is difficult enough and, as will be submitted, unnecessary to distinguish all these categories, and *Haseldine's* case provides further evidence. Are a tenant's visitors the landlord's licensees or invitees? In what position are visitors of a public recreation park? Are they to be split into ratepayers and others? On these points, among others, opinions are still sharply divided (*cf. Haseldine's* case and *Ellis* v. *Fulham B.C.* (1938), 1 K.B. 212). But worse than that, the categories seem to overlap. There are apparently two types of contractees, according to whether the employer is liable for the torts of his independent contractor or not (*cf.* Salmond, par. 132). The lower category overlaps with invitees, even if Scott, L.J.'s view as to the liability towards invitees is accepted. Lord Hailsham's dictum in *Addie* v. *Dumbreck* (1929), A.C. 358, confusing the position of invitees and licensees, is now regarded as having been "*per incuriam.*" But the Court of Appeal, having distinguished the two categories theoretically in *Ellis'* case, amalgamated them in fact, by holding that the Borough Council, though not aware of the existence of glass splinters in the pond, was aware of the danger of their existence, and therefore responsible for the injury caused to the child. What else is this but an indirect way of saying that the Council ought to have been aware of the presence of glass splinters and is therefore responsible, like an invitor? On the other hand, many cases of invitees, among them *Indermaur's* case itself, are really cases of contractees placed in a special category only because, at the time, and, to a lesser degree even now, the subsidiary rights and duties arising out of a contractual relationship were not yet clearly perceived. It is impossible to go into more detail in this note; but it may be tentatively suggested that a classification under three broad principles: Public Duty, Contract, and Negligence, would provide a much more satisfactory and simpler basis,

and that all possible cases could be brought under one of these categories. Sir Frederick Pollock suggested long ago (*Torts*, 14 ed., p. 406) that the separation of the liability of occupiers from the law of negligence has never been adequately explained.

The problem is connected with the other unsatisfactory aspect of the decision in *Haseldine* v. *Daw*: the liability for torts of independent contractors. As has been noted by various writers[1] the recent tendency has unmistakably been towards an extension of the employer's liability, and *Matania* v. *National Provincial Bank*, [1936] 2 All E.R. 633 seemed to have reached the point of general liability of an employer for the torts of an independent contractor incidental to the carrying out of the work for which he is employed. More recently, in *Wilkinson* v. *Rea*, [1941] 2 All E.R. 50, the Court of Appeal held shipowners liable for the negligence of independent contractors in leaving a hatch uncovered. True, Scott, L.J based his judgment entirely upon the breach of the statutory duty, which could not be discharged by delegation to an independent contractor; but Luxmoore, L.J., expressly gave a Common Law duty as a concurrent ground and referred to Pollock, 13 ed., p. 530, for the assertion that delegation of the performance of the duty of care to an independent contractor was no discharge of the duty. Unfortunately, the case was not referred to in the present decision, and the Court does not seem to have been aware of the confused state in which the question of an employer's liability for the torts of an independent contractor is at present. As a matter of legal policy, it is greatly to be desired that independent contractors should be placed on the same footing as servants. The principle of ultimate control as the test of responsibility is increasingly recognised in the modern law of tort, and, in modern industrial conditions, it is a matter of accident whether a complex process of work is carried out by means of subcontracting or by servants. Nor is the independent contractor always financially sufficiently strong to meet claims. In any case, the liability would be a joint one, and the employer entitled to indemnification.

The other part of the decision needs only brief annotation. The extension of the principle of *Donoghue* v. *Stevenson* to repairers has been unmistakeable and is plainly just. Scott, L.J., assailed in vigorous terms the attempts of some critics to turn the clock back and to whittle down Lord Atkin's principle or to read into it what was not intended. One of the critics thus attacked is described as Professor Stallybrass, in Pollock on Torts, 9 ed., p. 459. No doubt it is Salmond's textbook which is meant, but, with respect, there seems no justification in thus criticising the present editor of Salmond, whose brilliant modernisation of Salmond's book displays throughout a profound understanding of new developments in the law of tort and sympathy with the principle of *Donoghue's* case. The only problem in the present case was whether the much discussed "opportunity of inspection" interrupted the direct relationship between the repairer (the engineers) and the plaintiff. Clauson, L.J., thought so since, in the absence of any special circumstances, the repairer could not be reasonably assumed to remain responsible after having delivered the repaired object to the employer. But it would appear that the view of the majority is preferable, both on principle and authority, that "opportunity" means "duty" of inspection, and that, in the present case, the

[1] Salmond, 9th ed., 117; Chapman, 50 *L.Q.R.* 71–81; Friedmann, 1 *M.L.R.* 39, 53 *et seq.*

landlord could not reasonably be expected to examine the lift. The engineers were therefore liable in negligence for the negligence of their mechanic. *Dransfield* v. *British Insulated Cables*, [1937] 4 All E.R. 382 may now definitely be regarded as bad law.

It is greatly to be welcomed that both Scott and Goddard, L.JJ., firmly rejected the defendants' attempt to unearth *Earl* v. *Lubbock* (1905), 1 K.B. 253, and the latter plainly suggested that this case was no longer an authority. Unfortunately, the House of Lords in *Donoghue* v. *Stevenson*, attempted to prove that the new principle was not in contradiction to this and other earlier cases and thus missed the opportunity of firmly burying a string of cases decided on a now antiquated principle. The authority of precedent certainly becomes more and more of a problem, as the law of tort progresses. That it must progress Scott, L.J., emphasised in memorable words which will, it is to be hoped, be an inspiration to teachers of the Common Law—

> "The Common Law of England has throughout its long history developed as an organic growth, at first slowly under the hampering restrictions of legal forms of process, more quickly in the time of Lord Mansfield, and in the last 100 years at an ever-increasing rate of progress, as new cases, arising under new conditions of society, of applied science, and of public opinion have presented themselves for solution by the Courts" (p. 174).

How often precedent acts as a brake on development is shown by the present case. Both Scott and Goddard, L.JJ., wished to consider the plaintiff as an invitee, but Goddard, L.J., felt prevented from doing so by *Fairman's* case, while Scott, L.J., proceeded to upset the generally established interpretation of that case by examining what parts of the leading judgments were necessary to the decision and relegating the remainder to the position of *obiter dicta*. The expedient of distinguishing obsolete but nevertheless binding precedents is a favourite means of developing the Common Law. But it is a great obstacle to both simplicity and clarity. When, as in the present case, an attempt is made to re-interpret a leading case, teachers and students are in a difficult position. The increasing pressure of statutory legislation and of social change will, it is submitted, sooner or later lead to a more open change in regard to precedent. Those who consider this suggestion as shocking and revolutionary might perhaps find comfort in the fact that the modern doctrine of precedent is certainly not older than the 18th Century, and, according to some authorities, younger.

Another passage in Scott, L.J.'s, judgment requires at least brief mention. It emphasises what is recognised by a number of authors, that cases of so-called strict liability are—like the duty of an occupier to an invitee—referable to the duty of care, though they call for a higher degree of care because of the greater degree of danger to others. Sir Frederick Pollock, in conformity with his predilection for moral responsibility as the underlying principle of tort, always considered *Rylands* v. *Fletcher* as a case of negligence. Dr. Stallybrass (in Salmond, 9th ed., s. 149) has further developed that view. The present writer has maintained, in a number of contributions to this REVIEW (in particular, 1 *M.L.R.* 39 *ssq.*; 3 *M.L.R.* 309) that the distinction between strict and non-strict liability is rapidly losing any meaning. The view of Scott, L.J., seems to lend welcome authority to such an opinion, though the learned Lord Justice

proceeded to reaffirm the distinction between insurance and duty of care in the present case, as far as liability for independent contractors is concerned. That there is no necessity for this, has been pointed out above.

The decision as a whole presents a characteristic picture of the law of tort in its present state of development. It is on the way towards modern and broad principles, and a substantial proportion of distinguished judges is pushing it forward; yet it is hampered everywhere by the dead weight of precedents and principles which have no relation to modern conditions and little to commend themselves except their age.

W. FRIEDMANN.

By way of supplement to Dr. Friedmann's note, attention may be called to two observations of Goddard, L.J., in *Haseldine* v. *Daw* that bear on the rule in *Donoghue* v. *Stevenson*. The first concerns an interesting question on which there has till now been little authority. Suppose that in a case of the type of *Donoghue* v. *Stevenson* the manufacturer (or repairer) makes a contract with the intermediary whereby he is exempt from liability for negligence; does this contract affect the rights of the ultimate consumer who is suing the manufacturer? A dictum of Goddard, J. (as he then was), in *Fosbroke-Hobbes* v. *Airwork, Ltd.*, [1937] 1 All E.R. 108 at 112, although it was not directed to the rule in *Donoghue* v. *Stevenson*, indicates that there may be cases in tort in which a contractual exclusion of liability may affect third parties. However, in *Haseldine* v. *Daw* (at p. 185) the same learned Lord Justice rejected this possibility in a case of the type of *Donoghue* v. *Stevenson*. He observed: "It is said . . . that it is not right that a repairer who, as in the present case, has stipulated with the person who employs him that he shall not be liable for accidents should none the less be made liable to a third person. The answer to this argument is that the duty to the third party arises not out of the contract, but independently of it." (It is odd that the other judges do not say that there was this stipulation in the contract; *cp.* the terms of the contract set out by Scott, L.J., at p. 169.) But, as Goddard, L.J., went on to point out, the terms of the contract made by the defendant will have an important effect upon his liability if under the contract he was bound to execute certain specified works, which by their very nature created the danger to third parties. In such a case the responsibility for creating the danger rests not with the contractor but with the person who employed him. It may also be pointed out that if by his contract the defendant cast the duty of final inspection upon the other party to the contract, this may show that the negligence was not that of the defendant but that of the other party (*Kubach* v. *Hollands*, [1937] 3 All E.R. 907 at 910–11).

The second observation of Goddard, L.J., that seems to call for comment was an illustration of what he considered to be remoteness of damage. "If," he said, "I order my tailor to make me a suit, or a watchmaker to repair my watch, no one would suppose that anyone but myself was going to use the suit or watch. If the tailor left a large needle in the lining, and it injured a person to whom at some time I lent the coat, I should think that the latter could not recover against the tailor. The relationship would be altogether too remote" (p. 184). With respect, it is suggested that this turns the doctrine of remoteness of damage into a very difficult doctrine indeed. The general principle in the law of tort is that damage is not too remote if it were foreseeable in kind, even though it takes effect

in a degree or upon a person that was not foreseeable; and it is submitted that it would be undesirable to create special rules of remoteness for the particular benefit of defendants who are sued under the rule in *Donoghue* v. *Stevenson*.

G. L. W.

Black-Out Restrictions; Duty of Local Authorities to Light Obstructions in the Highway

There has been a crop of recent cases dealing with the duty of local authorities to light obstructions in the highway. The provisions of the Lighting (Restriction) Order, 1939, are relevant in each case and will be quoted here for the sake of convenience.

> Para. 1. Subject as hereinafter provided, no person shall during the hours of darkness cause or permit [any light to be displayed].
>
> Para. 4. Para. 1 of this Order shall not apply to the following lights for the guidance of traffic in roads . . . (*d*) lamps indicating obstructions upon or near the carriage way of the road provided they are of the candle power not exceeding one and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface.

In *Greenwood* v. *Central Service Co., Ltd.* (St. Marylebone B.C. Third Party) [1940] 3 All E.R. 389 the facts, taken from the headnote, were as follows. The driver of a taxicab, proceeding through the streets at night during the black-out collided with a bollard on a street refuge. A light had been placed on the refuge but had gone out. [It was proved that] the local authority responsible for lighting these obstructions in the roadway had appointed officers to attend to those lights, who went round on a lorry with tenders substituting lighted lamps for ones which had gone out. The accident happened before the lamp had been replaced.

The County Court found for the defendant Borough Council and the plaintiff appealed. The contention of the appellant was that the duty of the local authority to light this obstruction erected under the powers given them by s. 108 of the Metropolis Management Act, 1855, arose under s. 130 of that Act which provided that "every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted."

The Court of Appeal held, however, that the effect of the Lighting (Restriction) Order was to repeal temporarily the obligation imposed by the Metropolis Management Act. In the words of MacKinnon, L.J., "the Act having said that they should cause their streets to be well and sufficiently lighted, this Order forbade them to maintain such lighting at all." The Court also refused to uphold counsel for the appellant's plea that para. 4 of this Lighting Order (set out *supra*) imposed an absolute obligation to light obstructions in a particular manner, and held that such authority was permissive and not absolute within the rule laid down by Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 A.C. at p. 455. Their only obligation was therefore to use reasonable care, and this the Borough Council had in fact done. Luxmoore, L.J., concurred, holding that the obstruction was not a nuisance at Common Law, because it was erected under statutory authority, and could not become one merely by reason of the operation of the Lighting (Restriction) Order. Leave to appeal was given.

The Court of Appeal in *Wodehouse* v. *Levy* (St. Marylebone Borough Council, Third Party), [1940] 4 All E.R. 14, had no hesitation in overruling Cassels, J., and following its earlier decision in *Greenwood's* case. The facts were similar. The plaintiff was injured by a taxi driver's collision with an unlighted bollard on a street refuge. The relevant statutory powers have already been quoted.

MacKinnon, L.J., at p. 16, took the opportunity of repudiating his dictum in *Greenwood's* case where he said at p. 391: "No doubt, however, there would remain a Common Law obligation upon the respondents, having erected an obstruction on the highway, to use reasonable care to prevent that obstruction from being a danger to persons using the highway." He further held that had there been some duty to use reasonable care to light the offending bollard, there had in the circumstances, been no lack of care. The accident happened on the first night of the black-out; the Order concerning which had been promulgated only a few hours before it came into force. Goddard, L.J., summed up the view of the Court when he said, at p. 19: "I cannot find any obligation to light a refuge apart from a general obligation to provide an adequate system of street lighting. That became illegal and it followed that the Council committed no breach of their duty."

The *casus belli* in *Lyus* v. *Stepney B.C.*, [1940] 4 All E.R. 463, was a sand bin. It had been erected under statutory authority, was unlighted by reason of the Lighting (Restriction) Order, and was invisible to the plaintiff who collided with it without being guilty of negligence. It was proved that the Council had lit or painted the obstructions in the more important streets, but that at the time of the accident—fifteen days after the lighting restrictions had come into force – nothing had been done with regard to the street in which the bin was placed.

The Court of Appeal, per Scott, MacKinnon, and Luxmoore, L.JJ., were unanimous in holding that the question as to whether the bin was a nuisance must be determined with reference to the time of its erection, and as it was no nuisance at the time of erection, it did not become one later. They held further, that, on the assumption that the Borough Council were under a duty of care they were, not negligent solely because fifteen days had elapsed, since they had behaved reasonably in painting the main streets first.

It will be seen that these three cases all turned on the question as to the liability for obstructions erected before the war, well and adequately lighted so as not to prove dangerous, but which had subsequently become a source of danger owing to the black-out. In each case the Court of Appeal refused to hold the Council concerned liable either in nuisance or negligence.

In the last case under consideration the matter turned on liability for an air-raid shelter erected after the black-out restrictions had come into force. The facts of *Fox* v. *Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563, are taken from the head note. Fox, riding a bicycle along a street in Newcastle-upon-Tyne, collided with an air-raid shelter which had been erected in the street by the appellant Council. He sued the Council, claiming, (i) that the shelter was a nuisance, and (ii) that the Council had been negligent in not lighting it or otherwise making it visible.

The majority of the Court of Appeal—MacKinnon and Luxmoore, L.JJ., held that this case was indistinguishable from the three cases already discussed and found for the City Council. Du Parcq, L.J., however, in a judgment which, it is submitted with respect, is sound in law and logic,

dissented. He dealt first with the interpretation of the Act under which the erection was made, Civil Defence Act, 1939, s. 9, which provided as follows: "The local authority may provide a public air-raid shelter on any highway and may for that purpose construct works in or on the highway." This authority, he holds, is permissive or conditional, quoting Salmond on *Torts*, 9th ed. (1936) at p. 49, in support of his contention at p. 570 that "the permission is in general terms and it seems to me that it is reasonable to infer that the legislature means the undertakers to exercise their authority with reasonable care and not without it." In deciding whether or not such statutory powers have been exercised reasonably, he agrees with the principle laid down in *Lyus'* case that the relevant time which must be regarded is the date at which they were exercised, and he cites Luxmoore, L.J., at p. 468, "in our judgment the question whether the erection of the sand bin would hinder the reasonable user of the street by the public or any other person was one to be considered at the time when the sand bin was erected, and if at that time there was no such hindrance, it is difficult to see how at some later date it could be said that the sandbin had become a hindrance to the user of the street."

It is, however, in the application of this principle to the facts under consideration that he differs from the majority judgment. The shelter was erected *after* the black-out restrictions were already in force and this was, in Du Parcq's view, a fundamental fact distinguishing this case from the former ones. The local authority ought to have realised (and in fact did so, as the evidence showed) that in such circumstances the shelter, not properly lighted or painted, would be a source of danger to the users of the highway. Because it had been held that an obstruction originally lawful cannot become unlawful simply through the operation of the Lighting (Restriction) Order, he refused to hold, *a fortiori*, a local authority free from liability for erecting an obstruction, which at *the time of erection* was a danger. His argument is irrefutable when he says that to find for the City Council would mean that, whereas during building operations they would be governed by the ordinary rules as to liability for dangers on a highway if the piles of bricks, etc., were left unlighted at night, yet immediately on completion they were entitled to remove all warning lights and leave an invisible obstruction in the road. It is to be hoped that the House of Lords does not regard local authorities as being so privileged.

There is no need to point out the immense practical importance of the decision in *Fox's* case from the point of view of the ordinary citizen. It may reasonably be supposed that by now local authorities have painted or lighted all bollards, street refuges, "hideous statues of Victorian mayors," and other structures made dangerous because of the black-out, so that questions on the facts of *Lyus* v. *Stepney B.C.* and the preceding cases ought no longer to arise. But it is equally reasonable to suppose that there will be erected, from time to time during the continuance of the war, air-raid shelters for the use and protection of the inhabitants of a particular locality. Protection they may be in time of battle, but it is of doubtful value if on more peaceful nights the public are exposed, not to the dangers of bombs, but of unlighted and dangerous obstructions. Such an unnecessary risk, with the possibility that he may be put to serious financial expense, the ordinary man ought not to be expected to run. That the defendant Council appreciated this was clearly shown in the evidence given by them. They admitted that the shelter ought to have

been painted white, and they were only prevented from doing so at the time of the accident by the weather. Why then did they not continue to light it as they had done while it was under construction? It would ill become the courts to lower the duty which in all these cases local authorities have realised (shown by the steps they have taken) to be imposed upon them in the interest of the communities they serve. Far from its being a startling consequence that, as MacKinnon, L.J., asserted, the town clerk and the surveyor would have to light some obstructions and not others, it would as the authorities stand, be startling if this were not so.

Recognition of the necessity for a review of the recent cases dealing with the duty to light obstructions in the present blackout has lately come from the Court of Appeal. In *Foster* v. *Gillingham Corporation*, [1942] 1 All E.R., 304, Goddard, L.J., said at p. 306, "The discussion in this case shows that it is desirable that the cases decided during the present war relating to collisions with street refuges, sand-bins, and the like, during hours of black-out should receive further consideration."

The facts of the case are simple. The local authority erected a barrier across a highway near a crater made by a bomb. Hurricane lamps were hung on this barrier, but they had gone out because of the strong wind, and the man employed had failed to attend to the lights on the night in question. The respondent, who was on a bicycle, collided with the barrier and was injured. It was held per Lord Greene, M.R., MacKinnon and Goddard, L.JJ., that the appellants having placed the obstruction on the highway were under a duty to keep it lighted; there was evidence of negligence and they were therefore liable.

The case itself was no more than an application of the old principle in *Penny* v. *Wimbledon Urban District Council* (1899), 2 Q.B.D., p. 72, but it is of value in that it is one more argument in favour of du Parcq, L.J.'s dissenting judgment in *Fox* v. *Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563, at p. 567. In this latter case, MacKinnon, L.J., held that a local authority is under no obligation to light an air raid shelter erected after the black-out restrictions in pursuance of permissive statutory authority. With respect, it is difficult to see why the learned Lord Justice, in view of his earlier decision, held a local authority liable for failing to light a barrier to prevent persons falling into a bomb crater. One is tempted to suggest that on the arguments which were upheld in *Fox's* case, the local authority might have been in a stronger position had they taken no steps at all to light the obstruction.

It is not merely desirable, as Goddard, L.J., suggests, that these cases be further considered; it is of paramount importance both to the general public and to local authorities that each should know the extent of their rights and duties. For this reason, it is to be hoped that *Fox's* case, in which leave to appeal has already been granted, will be taken to the House of Lords.

I. C. MATSON.

Bills of Exchange and the Conflict of Laws

The decisions of Mr. Justice Tucker in *Banku Polskiego* v. *Muller & Co.*, [1941] 2 All E.R. 647, decided on June 24, 1941, and of Mr. Justice Stable in *Cornelius* v. *Banque Franco-Serbe*, [1941] 2 All E.R. 728, decided on June 25th, 1941, deal with problems of the conflict of laws relating to bills of exchange which for many years have been a familiar topic of discussion

in textbooks but on which there exists no or very little judicial authority. For this reason and also in view of the fact that the developments on the Continent have no doubt caused identical difficulties in numerous other cases, both judgments merit close examination.

In the former case a bill of exchange drawn in May, 1939, in Poland by a Polish firm had been accepted by the defendants in England. The bill was for 22,140 Dutch florins and was payable in November, 1939, at the Twentsche Bank in Amsterdam, but was not presented for payment or protested. In the action brought by a holder for value the acceptor's defence was based on the absence of presentment for payment which, it was alleged, was fatal both under English and Dutch law. In the latter case the plaintiff was the payee of a cheque for 2900 odd guilders drawn by the defendant bank on the Amsterdamsche Bank in Amsterdam which could not be presented, as on the day when the plaintiff received it Holland was invaded and shortly afterwards became enemy-occupied territory. Again the defence relied on the non-presentment of the cheque, and it was also alleged that, it having become impossible and illegal to present the cheque in Amsterdam and to receive payment there, an action on the cheque, as opposed to an action for the consideration, was precluded.

1. Thus in both cases it became in the first place necessary to decide what law governed the respective defendant's liability. In the *Banku Polskiego* case it seems to have been admitted that, the bills having been accepted in England, English law governed "the contract contained in them." Unfortunately it was not explained whether this was so by virtue of s. 72 (2) of the Bills of Exchange Act, 1882, which *prima facie* only deals with "the interpretation . . . of the acceptance" or by virtue of general rules relating to the determination of the "proper law" of the contract; in the former case a fresh extension of the term "interpretation" would have been brought about while in the latter case a reference to Dicey, pp. 672, 674, and to such cases as *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1891), 1 Q.B.D. 79, 82, 83, per Lord Esher, and *Broken Hill Property Co.* v. *Latham* (1933), Ch. 373, 397, per Lord Hanworth, might have been necessary and would probably have led to the application of Dutch law. The absence of any discussion on the point is particularly remarkable in view of the fact that Dicey, pp. 707–709, examines it at length and regards it as so doubtful that he does not venture an answer, and that, before the Act, Cockburn, C.J., had said in *Rouquette* v. *Overmann* (1875), L.R. 10, Q.B. 525, 536, that "the obligations of the acceptor are to be determined by the *lex loci* of performance." (In the same sense Westlake, p. 320.)

In the *Banque Franco-Serbe* case there is no explanation at all of the fact that English law was applied to the drawer's liability on the cheque. When the learned Judge came to deal with s. 72 (3) he made it clear that that subsection was inapplicable for the very reason that the cheque was subject to English law. If the cheque was drawn in England, this conclusion may be justified by that extension of s. 72 (2) which in the *Banku Polskiego* case seems to have found favour with Tucker, J., and although this does not appear from the judgment it must be assumed that the cheque was drawn in England. For if it was not so drawn, there is no justification whatever for the application of English law. This, therefore, is a vital point the clarification of which was still further necessitated by the fact that there is a suspicion that the cheque may have been drawn abroad. The defendants are stated to be a "French Bank"; the plaintiff had

communications with "the defendant Bank in Belgrade," the place of the residence of the plaintiff's debtor by whose orders and for whose account the cheque was sent; the defendant company is stated to have "its office in Belgrade, the London branch knowing little or nothing about the transactions." Yet, from a commercial point of view, it is of course quite plausible that the cheque was drawn by the London branch on the instructions received from its head office.

2. On the basis of English law the defence that non-presentation was fatal to the claim failed. In the *Banku Polskiego* case, where the acceptor of the bill was sued, this followed clearly from the rule that in the absence of a local acceptance (s. 19 (2) (*c*)) presentment at the place named or indeed anywhere is not required to charge the acceptor (s. 52 (1)). In the *Banque Franco-Serbe* case the learned Judge held that non-presentment was excused by s. 46 (2) (*a*). This provision applies where "after the exercise of reasonable diligence presentment . . . cannot be effected," the mere expectation of dishonour on presentment being insufficient. The plaintiff apparently did not prove that he had unsuccessfully tried to obtain the proper authorities' consent to forward and present the cheque in Amsterdam through the intervention of an agent, say, in New York. The decision, therefore, implies that "reasonable diligence" would not have required such an application and that, whatever its result might have been, presentment was impossible.

3. In both cases, however, the respective defendants alleged that it was for Dutch law as the law of the place of payment to decide the question of the effect of non-presentation, and relied on s. 72 (3) of the Bills of Exchange Act, 1882, which provides that "the duties of the holder with respect to presentment for . . . payment and the necessity for . . . a protest or notice of dishonour or otherwise are determined by the law of the place where the act is done or the bill is dishonoured."

S. 72 (3) has often been described as an "obscure" or "strange" section verging "perilously on unintelligibility" (Dicey (-Keith), 5th ed., p. 710, Westlake, pp. 322, 323, Cheshire, Private International Law, 2nd ed., p. 291; Foster, *British Yearbook of International Law*, 1935, pp. 99, 100). It has been pointed out that the section refers to three matters—presentment, protest, and notice of dishonour—and then, on the question of choice of law, indicates two legal systems, viz. the law of the place where the act is done and the law of the place where the bill is dishonoured, without any indication as to how these two systems are to be distributed between the three events. It has also been explained that a reference to the place where an act, such as presentment or protest, is done scarcely meets the difficulty that arises from the act not having been done (Westlake, l.c., Cheshire, l.c., p. 291), and it has been suggested that the word "act" includes "omission" (Westlake, p. 322), or that the words must be made to read "where the act is *to be* done" (Dicey, l.c., p. 710). It is obvious that the latter difficulty exists and the suggested remedy is necessary, only if it is assumed that s. 72 (3) determines the legal system applicable both to the question whether the act is or is not to be done, and to the question how it is to be done. If, on the other hand, the subsection merely relates to the method of doing an act where it is necessary, no difficulty arises from the act not having been done, as the significance and effect of such an omission would not be matters falling under the head of s. 72 (3) at all. Dicey and Westlake in fact have taken the view that s. 72 (3) is not restricted to questions of method, but extended

to questions of substance. Indeed, in so far as protest and notice of dishonour are concerned, this view is clearly right, as the subsection mentions both the necessity for and the sufficiency of such acts. But in connexion with presentment the statute is less explicit, and it is therefore possible, and perhaps more readily reconcilable with the words "is done," to hold that the provision is merely an example of the rule that questions relating to the method or mode of performance are governed by the law of the place of performance (see Cheshire, l.c., although he also mentions "matters connected with . . . the consequences of non-performance" which certainly relate to substance, not to method; on that rule see, *e.g. Auckland City Council* v. *Alliance Assurance Co.* (1937), A.C. 587, 606, per Lord Wright, who warned against any extension of the rule encroaching upon the substantive conditions of the contract; *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Insurance Society, Ltd.* (1938), A.C. 224, 241, 242, per Lord Wright; *Vita Food Products* v. *Unus Shipping Co.* (1939), A.C. 277, 291, per Lord Wright, and the cases quoted by Dicey, p. 672). The effect would be that the necessity for presentment and the consequences of non-presentment would be subject to the law governing the contract in general, and that the sufficiency of the presentment would be governed by the law of the place where the act is done.

It is probable, though by no means certain, that this is the view adopted by Tucker, J., in the *Banku Polskiego* case. The learned Judge had held that the defendants' liability was governed by English law which does not require presentment. On that basis the conclusion was justifiable, and seems in fact to have been drawn, that presentment being unnecessary under the law of the contract it could not become necessary by the law of Holland. This presupposes that s. 72 (3) does not determine the legal system governing the question of the necessity for presentment.

On the other hand, independently of Tucker, J.'s, decision rendered on the preceding day, but perhaps assisted by the argument of the eminent junior counsel who in the earlier case in vain contested the view which led him to success in the later one, Stable, J., in the *Banque Franco-Serbe* case, reached the same result and stated it in far clearer terms. In support of the proposition that English law, governing the drawer's liability as such, also applied to the necessity for presentment, the learned Judge referred to observations of Younger, J. (as he then was), in *Re Francke & Rasch* (1918), 1 Ch. 470, 479, which, however, do not appear to have a bearing upon the point. He also pointed to the fact (which was perhaps not really relevant) that "this action is being brought in an English Court," and continued, that s. 72 (3) "means no more than that where acts and formalities are required and where those acts and formalities are requirements of a foreign law, one must of necessity understand what the foreign law requires or one will not understand anything. Where, however, the English law says that no acts or formalities are required in these circumstances in any foreign country, it seems to me idle to inquire what the acts and formalities would be in a foreign country if performance of those acts and formalities had not been excused by the law of England."

No doubt, s. 72 (3) remains obscure in many respects, but it is satisfactory to note that, at least in one connexion, a workable solution of the difficulties which, it is believed, was originally suggested by Dr. Cheshire, has now been definitely established by the two recent cases.

4. Although both Judges held Dutch law to be irrelevant, they made a few remarks on that topic which, for the sake of comprehensiveness, ought to be noted. In the *Banku Polskiego* case Tucker, J., refused to express any view on the conflicting evidence on Dutch law which had been given before him. In the *Banque Franco-Serbe* case, however, Stable, J., held that there was no distinction between the laws of the Netherlands and that of England, and that Dutch law, like English law, excused the necessity of presentment where presentment is rendered impossible.

5. In the *Banque Franco-Serbe* case, however, a further point arose which caused Stable, J., "a very considerable amount of doubt." The defendants said that by English law it had become illegal for the plaintiff to present the cheque at Amsterdam and to receive payment there.

In reply to this argument the learned Judge emphasised that "there is nothing which makes it illegal for the plaintiff to receive the sum of money claimed from the defendants and nothing which makes it illegal for the defendants to pay that sum of money to the plaintiff," but that "the only illegality . . . was in relation to the machinery by which that payment could be effected." It is indeed very important to remember that under English law it was not in any way illegal either for the drawee (who unfortunately is not specifically mentioned by Stable, J.) or the defendants to pay or for the plaintiff to receive the money (s. 1 (*a*) (*b*) (ii) of the Trading with the Enemy Act, 1939), but it was merely illegal to present the cheque (s. 1 (2) (*a*) (ii) *ibidem*). If payment by the drawee had become illegal, it might well have become necessary to determine whether illegality of payment by the drawee involves the illegality of payment by the drawer whose obligation is often equiparated to that of a surety, and also to consider the import of such cases as *Ralli Bros.* v. *Compañia Naveira Sota y Aznar* (1920), 2 K.B. 287, and *De Béeche* v. *South American Stores, Ltd.* (1933), A.C. 148. Nor was it necessary to examine whether payment had become illegal under the law of the place of performance, *i.e.* Holland. No regard was therefore to be had to the effect of any legislation introduced in Holland by the German invaders. The decision was only concerned with the fact that no act other than presentment had become illegal under English law.

The learned Judge's view that this was immaterial to the claim was put on the broad ground that if presentation is dispensed with, this means that "all the machinery and formalities which presentation involves are, as it were, expunged, and the holder is at liberty, if he can, to obtain, or if he cannot obtain, to sue and recover, the money from the drawer," and that illegality of presentation does not involve illegality of payment. No fault will be found with this reasoning, although it might have been preferable to base the result on narrower grounds.

The drawer of a cheque engages that on due presentment it shall be paid according to its tenor, and that if it be dishonoured he will compensate the holder provided that the requisite proceedings on dishonour be duly taken (ss. 73 (2), 55 (1) (*a*)). Presentment having been held to be excused (see above paragraph 2), the cheque was dishonoured when it was overdue and unpaid (s. 47 (1)). There is very little authority on the question as to the due date of a cheque or bill payable on demand, but s. 36 (3) is probably of general application, although it clarifies the point only "within the meaning and for the purposes of this section." Can it be said, then, that the cheque has been in circulation "for an unreasonable time"? The Judge must be understood as having answered in the affirmative in which

event notice of dishonour was, of course, unnecessary as payment had been countermanded (Byles, *On Bills*, 20th ed., 1939, p. 17), and the judgment for the plaintiff was justified.[1] F. A. MANN.

Conscription in the Allied Armies

The Allied Forces Act, 1940 (3 & 4 Geo. 6, Ch. 51), by which English law took note of the Allied armies in this country and authorised them to exercise their functions within certain limits, does not deal with the question of conscription. The Act referred to the allied armies as they existed at the time of its enactment—consisting of those who came to Great Britain as their members and those who joined them here as volunteers—without saying anything about how these armies were to be enlarged in the future. In the debate in the House of Commons, Sir Edward Grigg, Joint Under-Secretary of State for War, said in explaining the Bill: "With regard to conscription, my right hon. Friend asked whether it was implicit in any way in this Bill. It is not. If compulsion is to be applied to the subjects of foreign nations in this country to join their forces, it must be done under separate legislation to be introduced later in this House."[1a] The importance of the two decisions *In re Amand*, [1941] 2 K.B. 239, and *Re Amand*, [1942] 1 All E.R. 236 consists in that according to them the allied nations are entitled to order the conscription of their nationals without having to wait for the separate legislation mentioned by Sir Edward Grigg. Both decisions also deal with the question, important in public and private international law, as to how far the constitutionality of decrees issued by sovereigns of allied nations can be examined by English Courts.

1. The facts in both cases are as follows: Jean Jacques Amand, a Netherlands subject, 34 years of age, had resided in this country for thirteen years as a business man. After the invasion of Holland by the Germans, the Queen of the Netherlands, her Government, and part of the Dutch army came to England on the invitation of the British Government. On 8th August, 1940, the Queen issued a Royal decree concerning compulsory military service of Netherlands subjects residing in Great Britain. Article 6 of the decree reads as follows: "By the calling up intended in Article 5 the persons designated as ordinary conscripts are deemed to be enlisted in the naval or land forces as ordinary conscripts." Under this decree a summons was issued to Amand by the Netherlands Ministry of Defence ordering him to report on 20th August, 1940, at a named camp and announcing a penalty in case of non-compliance. Complying with this summons Amand joined the Netherlands army on 20th August, 1940. He remained there until 30th January, 1941, when he was given seven days' leave. At the end of that leave period he did not rejoin his unit. On 14th March, 1941, he was arrested by the Metropolitan Police as an absentee without leave.

Amand made successively two applications to the High Court for a writ of *habeas corpus*. Both were dismissed unanimously, one by Viscount

[1] The decision of Tucker, J., in the *Banku Polskiego* case was affirmed by the Court of Appeal: (1942) 1 K.B. 497. The defendants had abandoned the contention that the bill was governed by Dutch law, and the decision of the Court of Appeal is therefore not material to the points discussed in this note. The report of the *Banque Franco-Serbe* case in (1942) 1 K.B. 29 is unfortunately somewhat incomplete.

[1a] *Parliamentary Debates*, Vol. 364, No. 106, p. 1384.

Caldecote, C.J., Humphreys, J., and Singleton, J. (*In re Amand*, [1941] 2 K.B. 239), the other by Wrottesley, J., Croom-Johnson, J., and Cassels, J. (*Re Amand*, [1942] 1 All E.R. 236).[2]

2. The respondents to the applications (Home Secretary and Dutch authorities) justified Amand's arrest and detention by referring to the Allied Forces Act, 1940, and to the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940 (Statutory Rules and Orders, 1940, No. 1818), issued under the Allied Forces Act. According to this Order the provisions of the Army Act relating to the apprehension of deserters and absentees without leave from a British military force shall apply to deserters or absentees without leave, from any allied force. In order to decide whether this justification was founded, the Court had first to find out whether, at the time of his arrest, Amand was a member of the Dutch army, since a man who is not a member of an army can never be a deserter or an absentee. The question of Amand's membership in the Dutch army is the main point in both decisions.

In dealing with this question the Court declined in both cases to regard Amand as having become a member of the Dutch army by voluntary enlistment and took the view that, if it was to be upheld, Amand's membership had to be proved otherwise than by voluntary enlistment. Here the difficulty arose whether British law or Dutch law should govern the question of his membership in the Dutch army.[3] The Court in both decisions inquired into the question from the standpoint of Dutch law. Viscount Caldecote, C.J., went so far as to say that the question whether somebody is a member of the military forces of a foreign power can be decided by the law of that power only. The material Dutch source is the Royal decree of 8th August, 1940, signed by the Queen of the Netherlands upon the presentation of her Minister of Defence, and concerning compulsory military service of Dutch subjects residing in Great Britain. By this decree and the individual summons based on it Amand became a member of the Dutch army under Dutch law.[4]

In the second decision the Court further examined whether by the publication of this Royal decree English law had been violated. In a very clear and convincing argument Wrottesley, J., points out that there is nothing contrary to international law or English law if a foreign country conscripts its nationals living in England and sends them the order to join the army. What the Queen of the Netherlands could lawfully do while in Holland, she can do lawfully in this country, to which she had come as an ally on the invitation of the British Government. What, however, cannot be done in England without the assistance of Parliament, is to enforce the conscription by compelling the foreign subject to join the Dutch army. But it was here that Parliament lent its assistance by passing the Allied Forces Act, under which the Allied Forces (Application

[2] On appeal against the decision of the Divisional Court refusing the application for a writ of *habeas corpus* the Court of Appeal (the Master of the Rolls, MacKinnon and Goddard, L. J.J.) unanimously held that it had no jurisdiction to entertain the appeal. [1942] 1 All E.R. 780.

[3] This is not a question of classification, as Dr. Winkel wrongly assumes in an article in the *Journal of the Society of Comparative Legislation*, 1941, p. 149. It is not the question of assigning a point to its legal category (of "classifying"), but of ascertaining according to which law a certain term ("member") is to be interpreted.

[4] On the question whether the Royal decree is in harmony with the Dutch constitution, see *infra* sub. 3.

of 23 Geo. 5, c. 6) (No. 1) Order, 1940, was issued which made the member of the Dutch army amenable to the enforcing machinery of the Army Act.

The only point which, in my opinion is, with great respect, subject to some doubt, is Viscount Caldecote's sweeping statement in the first decision that the question whether somebody is a member of a foreign army, can be decided by the law of that foreign country only. Although it stands to reason that the law of the country concerned governs this question *prima facie*, it is quite natural that English law, as the law of the country in which the foreign army is located, should limit the right of the foreign country to define the membership in its army, at least in so far as the enforcement of the duties resulting from such a membership by means of English law is concerned. Let us look shortly at the British legislation in this respect.

The first Act dealing with a subject similar to the Allied Forces Act is the Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. 5, Ch. 6) which contains provisions with respect to the discipline and internal administration of forces of the Dominions, when temporarily present in the United Kingdom. This Act, which served as a pattern to the framers of the Allied Forces Act, defines in s. 8 as "member" in relation to a visiting force any person "who is by the law of that part of the Commonwealth to which the force belongs subject to the naval, military or air force law thereof, and who, being a member of another force, is attached to the visiting force, or, being a civilian employed in connection with the visiting force, entered into his engagement outside the United Kingdom." This section, therefore, expressly provides that the question who is a member of a visiting force is to be decided according to the law of the country to which this force belongs. The Allied Forces Act, on the other hand, contains no similar provision. It authorises the King by s. 1 (3) to provide by Order in Council for the application to the allied forces of certain clauses of the Visiting Forces (British Commonwealth) Act, 1933. But s. 8 of this Act, which defines the membership of a visiting force, does not belong to the clauses mentioned in s. 1 (3) of the Allied Forces Act. The term "member" is therefore not defined by the Allied Forces Act either directly or by reference to the former Act. The Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940, by which certain clauses of the Visiting Forces (British Commonwealth) Act, 1933, were declared to be applicable to the Allied Forces Act, on the other hand, contains in s. 2 a definition of the expression "member," which according to this section applies to the use of this expression in this Order and its Schedule. This section provides that "member in relation to an allied force includes a person who, being a member of another force of the same allied Power, is attached to the allied force, but a person shall not be deemed to be a member of the forces of an allied Power unless he serves in the armed forces of that Power in a capacity corresponding to that of an officer or other rating or rank of His Majesty's forces." This clause shows that the meaning of membership of an allied Power need not necessarily be determined according to the law of this Power; this clause, in fact, adopts the meaning given to the term "member" by an allied Power, subject, however, to an important qualification: nobody can be regarded as a member of an allied force—at least as far as the application of the cited Order is concerned—"unless he serves in the armed forces of that Power in a capacity corresponding to that of an officer or other rating or rank of His Majesty's forces." As mentioned before, this definition of

membership in an allied Force applies according to s. 2 of the Order to the use of this term in the Order itself and its Schedule; it is, however, hardly imaginable how the Allied Forces Act and the Order, the purpose of which is the application and realisation of the Act, could be used in a satisfactory way, unless the term "member," used in both, was understood in the same way. It therefore seems reasonable to interpret the term "member," when used in the Act, in the same way as when used in the Order.

Neither of the two decisions *In re Amand* refers to s. 2 of the Order and its definition of membership; there was no necessity to refer to it as the qualification of the meaning of membership, provided for by this section, is of no importance in the case of Amand; he had joined the Dutch army, serving in it as a soldier, in a capacity, therefore, corresponding to that of a rank of His Majesty's Forces, and he lost this capacity neither by his 7 days' leave, nor by his absence without leave subsequent to his leave. The fact that the Court did not mention s. 2 of the Order cannot consequently be understood as if the Court regarded as inapplicable to the Allied Forces Act the definition of membership contained in this section; this question will remain open until a case arises of a civilian, who has been declared a member of an allied force by the authorities of the Power to which the force belongs—by a decree similar to that of the Queen of the Netherlands of 8th August, 1940—but has never joined the force and does not therefore serve in this force in a capacity corresponding to that of a rank of His Majesty's Forces.

Irrespective of this point, which has been left open by the decisions under review, the result of both decisions is this, that an allied Power is authorised to order conscription of its subjects living in Great Britain, without having to wait for an authorisation by a British Act, and that the British authorities are entitled and bound to lend this Power their help in enforcing such conscription against members of its force.[5]

3. The dismissal of the applications for a writ of *habeas corpus* was based in both decisions *In re Amand* on the decree of the Queen of the Netherlands of 8th August, 1940, by which conscription of the Dutch subjects living in Great Britain had been ordered. As mentioned *supra* sub. 2, English law did not in the opinion of the Court prevent the Queen of the Netherlands from issuing this decree. But the applicant had further claimed that the Queen was not authorised by the Dutch constitution to issue the decree. The reasons given by the applicant for this claim concern Dutch, not English law;[6] from the standpoint of English law, however, the question is important, whether the English Courts have the right to inquire into the constitutionality of the decrees of the Queen of the Netherlands or not. In both cases the Court dealt with this question in detail and came after some hesitation to the conclusion—by different reasoning in each case—that the English Courts had the right and the duty to inquire into the constitutionality of the decree of the Queen of the Netherlands. To arrive at this result, the decisions of the Court of Appeal in *Luther* v. *Sagor* [1921], 3 K.B. 532, and in *Princess Palay* v. *Weisz*, [1929] 1 K.B. 718 had to be distinguished. In both these cases the High Court and the

[5] Shortly before the printing of this note, on 17th June, 1942, a Bill providing for conscription with regard to subjects of allied Powers was introduced in the House of Commons. This Bill also deals with the meaning of the term "member" in the Allied Forces Act. *The Times*, 18th June, 1942.

[6] Incidentally, the Court found in both decisions that the royal decree was in conformity with the Dutch constitution.

Court of Appeal had held, in connection with the expropriation measures taken by the Soviet Government, that "if a foreign government is recognised by the Government of this country the Courts of this country may and must recognise the sovereignty of that foreign government and the validity of its acts" (Roche, J., in *Luther* v. *Sagor*, [1921] 1 K.B., at p. 474), that "it is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country" (Warrington, L.J., in *Luther* v. *Sagor*, [1921] 3 K.B., at p. 548), and that "our Government has recognised the present Russian Government as the *de jure* Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts" (Scrutton, L.J., in *Princess Paley* v. *Weisz*, at p. 725).

In the second decision *In re Amand* the Court distinguishes these statements of law by saying that they refer to acts of the foreign sovereign or government which were meant to take effect within the territory of this sovereign or government, whereas in this case, it is the question of a foreign sovereign's decree taking effect in Great Britain. With great respect, this distinction does not warrant the non-application of the rule expressed in *Luther* v. *Sagon* and *Princess Paley* v. *Weisz*. It is, of course, a generally recognised rule of law that the acts of foreign sovereigns and governments cannot directly affect persons and property in England, but nobody doubts that exceptions to this rule can be provided for by an Act of the British Parliament. Now, the Court found in the second decision (cp. [1942] 1 All.E.R. p. 241), that the enforcement of the Royal decree of 8th August, 1940, in Great Britain has been made possible by the Allied Forces Act, 1940, and the Order in Council issued under this Act. The result of this Act has therefore been that the territory in which a decree of the Dutch Queen could take direct effect was in certain cases extended beyond Dutch territory—to which such a decree normally applied—to British territory, and it cannot be seen why a decree of the Queen of the Netherlands should not have the same authority in both cases, which have been put on the same footing by Act of Parliament, and why it should not be subject to judicial review in one case and subject to it in the other.

That the view taken by the Court is open to question is also apparent from the following consideration. It has been decided by English Courts that questions relating to the existence, the status and the sovereignty of foreign Powers are not to be examined by the Court, but that the communications made by His Majesty's Government to the Court in this question are conclusive and binding upon the Court. ". . . When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive" (*Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 158, *per* Lord Esher, M.R.). In the case *In re Amand* it was stated to the Court on behalf of the British Government that " His Majesty's Government recognise Her Majesty Queen Wilhelmina and her Government as the sovereign and the Government of the Netherlands and as exclusively competent to perform the legislative, administrative and other functions appertaining to the sovereign and Government of the Netherlands." It is submitted that the question whether the Queen of the Netherlands, acting with the consent of the Dutch government, is competent to issue *any* decree in her capacity as Dutch sovereign has been conclusively decided

by that statement of the British Government in the affirmative, and that the Court should not have therefore entered into a further enquiry as to the validity of the Royal decree under the Dutch constitution.[7]

The fact, mentioned by the Court in the second decision, that Amand had no actual possibility of submitting the question of the validity of the Royal decree to a Dutch Court, cannot be regarded as a legal reason for assuming this function by a British Court, but only as showing that it would be desirable to establish the right of the British Court to review the royal decree, for which, however, a legal foundation must first be found. It may be noted that in *Luther* v. *Sagor* and *Princess Paley* v. *Weisz*, the parties who asserted the invalidity of certain acts of the Soviet government, had also no practical possibility to submit this question to a Soviet Court.

In the first decision *In re Amand* the Court arrives at the same conclusion as in the second decision, but the line of reasoning is somewhat different. It is said that "evidence is required to prove what is a question of fact, namely the foreign law." It is undoubtedly true that the question, what is the substance of the foreign legal provisions, may also depend on whether the foreign authority acted within its competence when issuing an order of general application, or whether this order is *ultra vires* and therefore invalid. For this reason the English Court can, no doubt, within the scope of its inquiry into the foreign law, examine the question whether an order of a foreign local government body was *ultra vires* or not. This right, however, does not in my opinion extend to the acts of those authorities of the foreign state, which according to the conclusive statement of the British Government are sovereign organs of that foreign state. This seems to be borne out by the statements of Roche, J., and Warrington, L.J., in *Luther* v. *Sagor*, quoted above, and this case therefore seems to be an authority against the review of the Royal decree irrespective of whether we examine the reasons given for its review in the first or in the second decision *In re Amand* .

There remains one argument for treating the case *In re Amand* differently from *Luther* v. *Sagor* and *Princess Paley* v. *Weisz*, namely, the wording of s. 1 (1) of the Allied Forces Act, which confers upon naval, military and air force courts and authorities of allied Powers "all such powers as are conferred upon them by the law of that Power." Wrottesley, J., who mentions this argument, adds that he does not attach much importance to that. With that I respectfully agree, especially for the reason that the mentioned provision of the Allied Forces Act refers to the competence of the naval, military and air force courts and authorities, but not to the competence of the Sovereign and the Government.

In conclusion it can therefore be said that I do not see any reason why the Court should have abandoned the doctrine established in *Luther* v. *Sagor* and *Princess Paley* v. *Weisz*, according to which the validity of acts of a foreign recognised sovereign government cannot be inquired into by English Courts.

PAVEL HARTMANN.

[7] The words "legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands" in the statement of the British Government obviously refer to the competence of the Sovereign and Government under international law and not under Dutch municipal law. This is also shown by the inclusion of the legislative functions in the above enumeration.

Extraterritorial Effect of Confiscatory Legislation

Atkinson, J.'s, decision in *Lorentzen* v. *Lyddon & Co.*, Ltd., 71 (1942) Ll.L.R. 197, the appeal against which was recently dismissed by consent so that the learned Judge's hope for a review by the Court of Appeal was unfortunately not fulfilled, requires a few words of comment. The plaintiff claimed damages for the repudiation of a contract by which the defendants had undertaken to charter a ship owned by a Norwegian company. The plaintiff, suing as "curator" of the ship, derived his title from a decree issued on the 18th May, 1940, by the Free Norwegian Government at Trondjem by which all Norwegian ships were requisitioned and put under the control of a curator who was authorised to exercise to the exclusion of the owners all rights of property over requisitioned ships, to collect claims due to the owners, enforce them by action, and so forth. A preliminary issue was tried to deal with the defendants' contention that this was a confiscatory decree which could not be accorded extraterritorial effect so as to comprise property situate in this country. Atkinson, J., prefaced his actual decision by a review of the long line of authorities which are collected by Dicey (-Keith) 5th edition, p. 610, note K, and which had hitherto been generally regarded as laying down the rule that confiscatory legislation is without extraterritorial effect. He arrived at the conclusion that all those cases had been misunderstood and in truth rested on the fact that the foreign legislation, if properly construed, did not intend to have extraterritorial effect, and that therefore the Court was not prevented from allowing such effect where the foreign legislation did claim it; in the latter connexion Atkinson, J., was greatly influenced by the decision of Mr. Justice Shientag who, sitting as a Judge of first instance in the Supreme Court of New York, had upheld a similar decree of the Free Dutch Government in London (*Andersen* v. *N.V. Transandine Handelmaatschappij* (1941), N.Y. Sup. (2d) 547), and whose decision had been based on the obscure and unsatisfactory decision of the Supreme Court of the United States in *U.S.* v. *Belmont* (1936), 301 U.S. 324, which should not be read without reference to Professor Borchardt's comments in *American Journal of International Law*, 1937, 675. It is probably no exaggeration to say that the principle that confiscatory legislation is denied any effect upon property situate outside the boundaries of the confiscating state, has hitherto been regarded as one of the most securely established and most commonly accepted maxims of international law, not only in this country and in most American jurisdictions but also on the Continent where, under the leadership of the French Cour de Cassation, it has even been held that *sans une juste et préalable indemnité* confiscatory legislation cannot be recognised even in respect of property situate within the confiscating state: Art. 545 Code Civil and Cass. Req., 5th March, 1928, Clunet, 1928, 674; Cass. Civ., 14th March, 1939, Clunet, 1939, 615. Those who not too long ago came into contact with the numerous devices of the Nazis by the appointment of "curators" or otherwise to obtain control over the non-German property of the victims of their persecution, will gratefully remember the salutary effect of that principle which in practically all Continental countries led to the nullification of those devices and in this country resulted in any attempts at enforcement being nipped in the bud so that it was only during the war that technical reasons gave Mr. Justice Simonds an opportunity of confirming what had previously been regarded as obvious: *Bohm* v. *Czerny*, *The Times* Newspaper, 26th July, 1940.

Having thus prepared his ground by removing what he considered to

be an obstacle, Atkinson, J., proceeded to give two and perhaps three reasons for holding positively that the Norwegian decree had effect on property situate here. In the first place he thought that the decree was not confiscatory at all, because it provides that "compensation . . . shall be fixed in accordance with Norwegian law." There does not seem to exist any authority for the view that the lack of compensation is a prerequisite of the conception of confiscation, and it is difficult to see why confiscation should lose its character by the payment or promise of compensation and require more than the commandeering of property by force without the owner's consent. The least that would have to be demanded would be the payment of *une juste et préalable indemnité*; such a requirement, however, would be bound to involve a Judge in difficult questions of fact and to permit subterfuges and disguises which would only lead to complications where justice calls for certainty and simplicity. Secondly, however, Atkinson, J., based himself on a ground which, it is submitted with the greatest respect, is not only theoretically attractive, but intrinsically sound and which might have obviated the whole of the introductory observations: "Public policy certainly demands that effect should be given to this decree. To suggest that the English Courts have no power to give effect to this decree . . . seems to me almost shocking." In the prevailing circumstances this cannot be controverted. This is so obvious that the subsidiary reference to the comity of nations can add only little to the weight of the argument. But those concerned with the theoretical aspect of the matter will note with interest a probably unique case where public policy is resorted to for the purpose not of excluding an unacceptable foreign law nor of giving overriding effect to a basic principle of English law, but for the purpose of allowing foreign law to impose itself to the exclusion of what it is hoped will remain a general rule of English law.

F. A. Mann.

Capital or Income?

Benson v. *Counsell* (1942), All E.R. 435, and *Hobbs* v. *Hussey* (1942), All E.R. 445, though comparatively unimportant in themselves, form a useful pendant for a brief disquisition upon the broad distinction our Courts have made between "capital" and "income" in their interpretation of the Income Tax Acts.

The well-known schedular classification of sources of income in the British Income Tax code prevents "capital profits" being considered other than in relation to the notorious Schedule D of the Income Tax Act, 1918. Case I of this Schedule charges the profits derived from any trade, etc., adventure or concern in the nature of trade while Case VI thereof—the famous "sweeping-up" case—charges "the annual profits or gains not charged by virtue of any other Schedule or Case." In the case of trades, etc., an "accretion of capital" can only be included in the computation of profits if "what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business"—see Lord Trayner in his oft-commended judgment in *California Copper Syndicate* v. *Harris* (1904), 5 Tax Cas., at p. 165; an example of taxable "capital profits" arising in the ordinary course of business is where an insurance company realises its investments at a profit. It should, however, be noted that the profit made on the sale of a single asset may be "income" if what is done amounts to the carrying on a trade, see *Martin*

v. *Lowry*, [1927] A.C. 312, where a huge stock of linen purchased in one lot was sold at a handsome profit over a period of months.

The position resulting from "casual profits" arising from isolated transactions is somewhat different. If what is done is the purchase and resale of property, tax is not attracted if the profit is mere "capital accretion" *vide* Rowlatt, J., in *Ryall* v. *Hoare*, [1923] 2 K.B. 447: "Two kinds of emoluments must be excluded from Case VI. First anything in the nature of capital accretion is excluded as being outside the scope of the (Income Tax) Acts confirmed by the usage of a century. For this reason, a casual profit made in an isolated purchase and sale, *unless* merged with similar transactions in the carrying on of a trade, is not liable to tax." This principle was approved in *Leeming* v. *Jones*, [1930] A.C. 415, where, too, it was held that the word "annual," qualifying the term "profits and gains" in Case VI, Schedule D, definitely connoted the idea of "income" as opposed to "capital." Earlier the House of Lords, in *Martin* v. *Lowry*, [1927] A.C. 312, had approved Rowlatt, J.'s dictum in *Ryall* v. *Hoare* (*supra*), that the word "annual" did not necessarily connote the idea of "recurrence," but equally well meant "in any year." On the other hand, in this latter case, it was held that where an emolument—to use a general term—accrued by virtue of *services rendered*, it came within the words "profits and gains" and was therefore taxable under Case VI, even though it arose on a single isolated occasion, e.g. from guaranteeing a bank overdraft, writing a book, etc.

Where, however, the transactions are many and not isolated, liability may be attracted, even where what is done does not amount to the carrying on of a trade assessable under Case I of Schedule D, provided that the profits therefrom are definitely of an income or revenue character, e.g. profits from speculating in cotton futures—see the Court of Appeal in *Cooper* v. *Stubbs*, [1925] 2 K.B. 753.

The law as to "capital profits" is very different in the United States, where the Supreme Court has repeatedly held that the concept of income embraces the profits derived from the sale or conversion of capital assets, whether the transactions be many or in the ordinary course of trade—*Eisner* v. *Macomber* (1920), 252 U.S. 189—or single and isolated as in *Merchants Loan & Trust Co.* v. *Smietanka* (1921), 255 U.S.520.

Having briefly set out the principles that differentiate between "capital" and "income" for taxation purposes, their application to the cases referred to at the opening of this note may now be considered. In *Benson* v. *Counsell* (1942), 192 L.T. 62, a syndicate purchased a stallion, the members being entitled to one free nomination annually for their mares; during the years 1934–1940 the appellant sold his nominations. Lawrence, J., held that the sums received were taxable under Case VI, Schedule D, as being of a revenue nature; what was purchased was the horse and not the nominations, so that the principle in *Leeming* v. *Jones* did not apply, since there was no purchase and resale of property. The transactions were a mode of realising the reproductive faculty of the horse, and the profits therefrom were analogous to interest or fruit as contrasted with principal or tree. As the transactions were many and not isolated, the principle in *Cooper* v. *Stubbs* applied, i.e. the profits, not being of a capital nature, were taxable as income under Case VI, Schedule D.

In *Hobbs* v. *Hussey* (1942), 1 All E.R. 445, the appellant sold the serial rights of his life's story to a newspaper and was assessed on the receipts under Case VI, Schedule D; it was argued for him that the sums received

represented a realisation of capital, i.e. sale of the copyright of the articles, and so were not taxable as income. Lawrence, J., held that, as the profit arose primarily from the performance of services by the appellant, i.e. the writing of the articles, it was—following Rowlatt, J., in *Ryall* v. *Hoare* (*supra*)—of an "income" nature and therefore taxable; the sale of the copyright was merely incidental to the rendering of the services, and since the transaction was in essence of a "revenue" nature, it was immaterial that it was an isolated one. *Earl Haig's Trustees* v. *I.R.C.* (1939), S.C. 676, where the profit on the sale of diaries by the trustees was held to be of a capital nature was not followed either, being distinguished on its special facts and an interpretation of the trust deed or as being contrary to the principle in *Ryall* v. *Hoare*. A. FARNSWORTH.

Taxation of Income from the Ownership and Occupation of Land

Bamford v. *Osborne*, [1941] 2 All E. R. 426 (H.L.), and *Sywell Aerodrome, Ltd.* v. *Croft*, [1941] 2 All E.R. 325, are of more than ephemeral interest since they exemplify the necessity for constantly bringing up to date the charging of income to tax by virtue of its schedular classification—a mode of charge that dates in almost unchanged form from Pitt's Income Tax Act of 1805. If a source of income is clearly within one of the various schedules of the Income Tax Act, 1918, it can only be charged to tax in accordance with the rules of the particular schedule. For example, income arising from real property—to employ a useful generic term—is charged on the annual value of the property, and if a rent arises in excess of such value, no charge could be made on the amount of the excess (see *Salisbury House Estates, Ltd.* v. *Fry*, [1930] A.C. 432). Again, Schedule B charges the income arising from the *occupation* of land upon the amount of the annual value thereof, regardless of the actual income derived by the occupier; this is so even where the nature of the occupation is that of a very profitable stud farm (see *Lord Glanely* v. *Wightman* (1933), 49 T.L.R. 356 (H.L.)). It should, however, be noted that profits from the occupation of nurseries and market gardens were charged on the amount of the actual profits in the same way as those arising from a business. The unjustified loss of revenue arising from these loopholes in the law was discussed at 1 M.L.R., 293–4, and both have, to a great extent, been remedied by later legislation.

In *Sywell Aerodrome, Ltd.* v. *Croft*, the appellants owned an aerodrome, part of which they let and/or licensed to an aerodrome company and from part of which they derived other rents. In an attempt to charge the company under Schedule D on the difference between its actual income and the notional annual value charged under Schedules A and B, Income Tax Act, 1918, it was held that the whole of its profits arose from the ownership and occupation of the land and that its liability was therefore exhausted by the assessments already made under Schedules A and B, the two House of Lords' decisions referred to above being regarded as conclusive. Since the year to which the appeal related, the law regarding "excess income" arising from the ownership of land has been changed (see sections 15–17, Finance Act, 1940, discussed at 4 M.L.R., 196–7). Briefly, in the case of all agreements and leases for less than fifty years, the beneficial owner of any property is now chargeable under Case VI, Schedule D, on the excess of his true income from the property over the notional income, i.e. annual value charged under Schedule A.

The facts in *Bamford* v. *Osborne* and the judgment of the Court of Appeal were set out and fully discussed at 4 M.L.R., 67–8. In this case the Court of Appeal (Scott, L.J., dissenting) had upheld a finding by the Appeal Commissioners that a single unit of assessment could be split up for taxation purposes into a notional "garden" chargeable on the actual profits (*cf. supra.*) and into "farmland," the charge in respect of which was notional, i.e. upon the amount of the annual value. The House of Lords unanimously approved the dissenting judgment of Scott, L.J., and ruled that there was no evidence on the peculiar facts of this case to justify the "split" of a single holding into two parts chargeable as a "garden" and as "farmland" respectively; in the result the whole of the land was chargeable on the notional annual value which was very considerably below the actual profit made. In point of law it was held that a single holding could be "split" into two parts if the evidence to justify this were satisfactory, and in this regard *Dennis* v. *Hicks* (1935), 19 Tax. Cas. 219, and *D. Lowe & Sons, Ltd.* v. *Inland Revenue* (1938), 21 Tax. Cas. 597, were approved. Historically the instant case is of considerable interest, but as a practical issue it is no longer of importance, since ss. 10–11, Finance Act, 1941, charge the income arising from the occupation of *all* land—except that not occupied mainly for the purposes of husbandry—under Schedule D upon the actual profits arising and in the same manner as any other business. It should be noted, however, that where an individual and, broadly speaking, a partnership occupies land of an annual value of less than £300, the profits from occupation still continue to be charged under Schedule B on the notional amount thereof, viz. the annual value, i.e. what the land is worth to be let by the year.

A. FARNSWORTH.

The Statutory Warranty of Fitness in the Courts

The scales of justice have never been held evenly between landlord and tenant in English law. Despite the intervention of Equity and of the Legislature the law, on the whole, still inclines strongly in favour of the landlord. This is shown very clearly by the absence of any obligations imposed by law on landlords of unfurnished houses to provide premises fit for habitation or to execute even the most essential repairs. It is left to tenants, assisted by lawyers and surveyors, to stipulate for express warranties of fitness and covenants to repair by the landlord.[1] The lack of protection for tenants not enjoying sufficient bargaining strength and unable to pay for professional advice has thus contributed to the housing difficulties of the working classes, and one of the earliest measures adopted in dealing with this problem was the imposition of an implied warranty of fitness on the landlords of working class houses by s. 12 of the Housing of the Working Classes Act, 1925, which was finally re-enacted in s. 2 of the Housing Act, 1936.[2] Whereas with regard to the Housing Legislation in general the task of the courts was one of supervision and control

[1] "A man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, 'this house is not in a proper condition, and you or your builder must put it into a condition which makes it fit for my living in,'" *per* Romilly, M.R., in *Chappell* v. *Gregory* (1863), 34 Beav. 250, at 253.

[2] The warranty of fitness has been successively enacted in the Housing of the Working Classes Act, 1885, s. 12; the Housing and Working Classes Act, 1890, s. 75; the Housing Town Planning, etc., Act, 1909, ss. 14, 15; the Housing Act, 1925, s. 1; the Housing Act, 1936, s. 2.

of administrative agencies,[3] in this instance they were entrusted with a far more direct function since the value of the statutory warranty of fitness depended on the manner in which the obligation imposed on landlords would be interpreted and enforced by the courts.

The results of judicial participation in the struggle for improved housing conditions are such that no share of the credit for the progress made can be attributed to the operation of the statutory warranty. The standard of fitness which has been established is probably not higher than that which would be observed in his own interest by any landlord of slum property. The statutory remedy has been confined within narrow limits of substance and procedure and its enforcement subjected to conditions which in many, if not most, cases it is impossible to fulfil.

The explanation cannot be found in open or concealed dislike of the policy of the Housing Legislation. Various judicial *dicta* show that this policy has been fully understood and approved by the courts.[4] The judges have mostly felt bound to ignore these considerations and to interpret the statutory warranty of fitness as part of the ordinary law of landlord and tenant which has developed in the entirely different spirit of freedom of contract. This principle explains the enforcement of the terms of a lease as a bargain freely struck between parties who in justice must accept responsibility for obligations assumed by them and who are deemed best qualified to determine the consideration adequate for the commodity acquired, this commodity being here the exclusive possession of land. The complement to freedom of contract is the principle of fault liability. Thus, obligations in the sphere of the law of contract are deemed to arise from the free will of the individual, just as his deliberate or negligent acts are the source of delictual liability. All private law is therefore based on the assumption of freedom and equality of the individual. Social legislation proceeds from very different foundations. It involves many inroads on contractual freedom and the sacrifice of liability based on individual fault so as to place loss in accordance with social justice and economic expediency. Instead of assuming the existence of freedom and equality social legislation requires the recognition of the reality of economic dependency and of permanent inequality of bargaining strength, and the interpretation of a piece of social legislation, such as the statutory warranty of fitness, from the premises of freedom of contract was therefore bound to prejudice the achievement of the purposes of the reform.

As regards the standard of fitness to be imposed, this difficulty appeared already in the first decision in which this question was considered. In *Stanton* v. *Southwick*[5] it was held that a house had not been rendered unfit by the almost continuous presence of considerable numbers of rats. This remarkable result was reached by relying on the fact that the house had not been infested but overrun by rats who invaded the house from an adjoining sewer.[6] Salter, J., referred to the decision in *Carstairs* v. *Taylor*[7]

[3] The manner in which this task has been discharged has been examined by Dr. I. W. Jennings in "Courts and Administrative Law—The Experience of English Housing Legislation," 49 Harv. L.R. 426.

[4] *But* see the judgment of Salter, J., in *Jones* v. *Geen*, discussed below.

[5] (1920), 2 K.B. 642.

[6] It has been held that the warranty of fitness implied at common law in the case of the letting of furnished houses is broken if the premises are infested with vermin. *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Campbell* v. *Wenlock* (1886), 4 F. & F. 716; *Harrison* v. *Malet* (1886), 3 T.L.R. 58.

[7] (1871), L.R. 6 Ex. 217.

where it had been held that the invasion of rats could not be prevented, and that the landlord was therefore not liable for damage caused thereby. The reference to *Carstairs* v. *Taylor* shows that the question of fitness was determined in the last resort by applying the test of fault liability. This is, however, not clearly expressed in the judgment; nor was it attempted to explain the decision from the point of view of the policy of the statutory warranty. As the statute is concerned with the improvement of housing conditions rather than with the conduct of landlords it would seem difficult to justify the manner in which the question of fitness was answered by examining whether any blame could be attributed to the landlord. In the court of first instance it had been found that the landlord knew at the time of letting that the premises were overrun by rats and that he neglected to take proper steps to get rid of them. As this finding was not contradicted in the higher court the judgment given there seems unsatisfactory even if tested by the principle of fault liability.

In *Jones* v. *Geen*[8] the tenant of a house falling under the Act had covenanted to keep the premises in good and tenantable repair. It was contended that this covenant was void as it conflicted with the statutory warranty of the landlord, but it was held that the obligation of the landlord could stand side by side with that of the tenant since the standard under the tenant's covenant was far higher than that imposed under the statutory warranty. Salter, J., argued that the Housing Acts are "directed against slums, overcrowding and buildings in which people are herded together in conditions unsuitable for human habitation; and the standard of repair required by those Acts is naturally for those purposes a humbler standard"[9] as compared to the far higher standard of comfort and repair implied by a covenant to repair. It may well be questioned whether the Housing Legislation does not aim at far more substantial improvements of housing conditions than would result from the correction of the worst abuses. But the most unfortunate effect of the decision in this case was the precedent set for the comparison of the standard imposed by a repairing covenant and the standard of the statutory warranty of fitness. This comparison was drawn in *Morgan* v. *Liverpool Corporation*[10] and in *Summers* v. *Salford Corporation*.[11] In both cases the question arose whether a working class house had been rendered unfit for habitation by a defective window cord which had made it dangerous to open this window. In *Morgan*'s case the matter was considered *obiter* as the tenant's claim failed on the ground that no notice of the defect had been given to the landlord. But in the second case, in which notice had been given, the decision was directly on this point. In both cases it was held by a majority decision that a broken window cord was a mere "trifling disrepair," not sufficient to render the house unfit. Once, following *Jones* v. *Geen*, the minds of the judges had been directed into the familiar channels of the ordinary law of landlord and tenant this result was almost inevitable. The distinction between disrepair and unfitness is well established in the general law of landlord and tenant[12] and is reasonable if tenants can be assumed

[8] (1925), 1 K.B. 659. [9] At p. 668. [10] (1927), 2 K.B. 131.
[11] (1941), 1 All E.R. 153; affirmed (1941), 2 K.B. 218.
[12] See *Maclean* v. *Currie* (1884), Cab. & El. 361. On the other hand no "humble" standards have been adopted to define unfitness caused by war damage for the purpose of the Landlord and Tenant (War Damage) Acts—despite war-time austerity. Thus, in *Boudou* v. *Thornton-Smith* (1941), 1 K.B. 561, the Court of Appeal held that premises were unfit although the damage could have been repaired at small cost.

to possess a free choice between stipulating for a repairing covenant by the landlord or preferring other terms, such as a lower rent. The statutory warranty of fitness was, however, enacted precisely because working class tenants, without any choice in this matter, were found unable to procure for themselves the benefit of a covenant to repair from their landlords. It would, therefore, seem plainly unjust to inform a tenant claiming the protection of the statutory warranty that the defect in question was not sufficiently grave to justify his claim although he might succeed in an action for breach of covenant to repair, a remedy which he is known not to possess. It would be equally unjust to landlords to consider any really trifling defect as a breach of the statutory warranty; but it would seem essential to determine the question whether the defect can be described as trifling in the light of the actual housing conditions of the poor, without resort to conceptions, such as that of disrepair, which are suited to different circumstances. This was the method followed by Atkin, L.J., as he then was, in his dissenting judgment in *Morgan*'s case, and by Luxmoore, L.J., in *Summers'* case. Lord Atkin pointed out that, however trivial a broken sash cord might be in a large house, it might be sufficient to render a two-bedroom working class house insanitary and unfit for habitation. It might be added that a defect trivial since easily repaired might become very serious if the tenant could not afford the expense of the repair.

The application of the rules of the ordinary law of landlord and tenant has produced equally unfortunate results on the question of the scope of the statutory remedy. Thus in *Middleton* v. *Hall*[13] and *Ryall* v. *Kidwell*[14] it was decided to extend to the statutory warranty of fitness the rule laid down in *Cavalier* v. *Pope*[15] where it was held that no action would lie to recover damages for injuries suffered by the wife of the tenant as a result of the landlord's breach of covenant to repair. In *Middleton* v. *Hall* the wife of the tenant was injured by falling through a defective staircase. Bankes, J., refused to allow the claim for compensation on the ground that the success of this action would enable "any child, visitor, artisan, workman, or any other person who goes to such a house upon any business" to recover and "that would be throwing an enormous responsibility upon the landlord." This argument is reminiscent of that advanced against the modern extension of the scope of the action of negligence. The inconvenience of too rigid adherence to the principle of privity of contract has been recognised[16] and to some extent remedied by modern developments in the law of tort, of contract, and even in the law of landlord and tenant.[17] The extension of the principle of privity of contract to the statutory warranty of fitness could therefore scarcely be justified, least of all by any necessity to protect the interests of landlords.[17a] An

[13] (1912), 108 L.T. 804.
[14] (1914), 3 K.B. 135.
[15] (1906), A.C. 428.
[16] Cf. the comment of Sir Frederick Pollock on *Donoghue* v. *Stevenson* (1932), A.C. 562 in 49 L.Q.R. 22; as regards the law of contract, see the Report of the Law Revision Committee on the Doctrine of Consideration and comment thereon in 1 Mod. L. R. 106.
[17] This appears from *Cunard* v. *Antifyne* (1933), 1 K.B. 551, and *Wildrick* v. *Marks* (1934), 2 K.B. 56; but, on the whole, the law of landlord and tenant and in particular the rule in *Cavalier* v. *Pope* has withstood reform more successfully than other branches of law, see e.g. *Bottomley* v. *Bannister* (1932), 1 K.B. 458 and *Otto* v. *Bolton* (1936), 2 K.B. 46. Cf. also the inapplicability of the doctrine of impossibility of performance to leases.
[17a] See the remarks of Dr. Glanville Williams, *supra*, at p. 212.

increase of the responsibilities of the landlord would have assisted in the achievement of the policy of the Housing Acts by adding a stronger incentive for the observance of the required standard of fitness, instead of permitting the landlord to take advantage of the accidental selection of the person to suffer from the landlord's admitted breach of duty. In *Ryall* v. *Kidwell*, where the injuries were suffered by the daughter of the tenant, the landlord succeeded on the ground that the obligation imposed on him, although derived from statute, was of contractual character and therefore only enforceable between the parties to the lease. From this decision onwards the difference between the obligation voluntarily undertaken in a covenant to repair and that imposed by statute, which was still clearly recognised in the judgment of Bankes, J., in *Middleton* v. *Hall*, has been completely obliterated. In *Ryall* v. *Kidwell* as in all subsequent cases under the Act the judges felt constrained to attribute contractual character with all its implications to the statutory warranty because of the terms in which it had been enacted. Against the magic of the words "in any contract for letting for human habitation . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is . . . in all respects reasonably fit for human habitation" the spectacle of the contradictions and difficulties bound to result from treating as contractual, i.e. based on mutual consent, a term added to the lease regardless of the actual or presumed wishes of the landlord has been of no avail. Thus in *Dunster* v. *Hollis*[18] the rule which exempts from the landlord's covenant to repair any part of the house retained in his possession was extended to his liability under the statutory warranty. Again the rule of the ordinary law of landlord and tenant which provides that a landlord cannot be made liable for breach of his covenant to repair unless he has been given notice of the want of repair was applied to the statutory warranty in *Fisher* v. *Walters*[19] and by the unanimous decision of the Court of Appeal in *Morgan* v. *Liverpool Corporation*. In *Fisher* v. *Walters* it was held that no notice was required in the case of a concealed defect as it was thought that this was the rule with regard to contractual covenants. But in *Morgan*'s case it was held that failure to give notice was fatal to the tenant's claim even if the defect was of latent character. This was explained on the ground that the tenant, having exclusive possession, could more easily discover defects and that it would be unjust to make the landlord liable for damage resulting from a defect of which he was unaware. This argument expresses the principle of fault liability under which loss must be borne by the person on whom it has fallen unless its cause can be traced to the fault of another person. It would seem more in accordance with the character of the Housing Acts to determine the incidence of liability in the case of a latent defect by chosing between two equally innocent persons the one better able to sustain it. The requirement of notice even in the case of patent defects can only be justified if tenants can be deemed to know the law or to enjoy legal advice, two suppositions which cannot be made with regard to working class tenants.[20] In the case of latent defects notice cannot be given so that tenants are deprived of the protection of the statute, although there

[18] (1918), 2 K.B. 795.
[19] (1926), 2 K.B. 315.
[20] For statutory recognition of this fact see s. 1 (4) of the Leasehold Property Repairs Act, 1938.

is no mention of this requirement in s. 2 of the Housing Act. The concurrence of a judge of the exceptional independence of mind of Lord Atkin in the decision of the majority in *Morgan*'s case on the question of notice demonstrates the strength of settled habits of thought in law and of the tendency of the courts, when administering a new statutory remedy, to observe rules laid down by them with regard to a similar common law remedy.

It would be possible to remedy the unfortunate results reached in the interpretation of the statutory warranty by amending the Housing Act, and judicial comments on the draftsmanship of the section, such as those recently made in *Summers* v. *Salford Corporation*, seem to recommend this course. On the other hand, the experience of the Workmen's Compensation Acts and of the Rent Restriction Acts shows that the incorporation of detailed provisions into social legislation may create as many difficulties as it solves. The problems of social legislation cannot be solved by the Legislature alone. If the courts are to share in this task successfully it will be necessary to reconsider the suitability of the fundamental assumptions of the common law for the purpose of interpreting social legislation. It is to be hoped that this will be done by the House of Lords which has not yet been called upon to deal with the statutory warranty of fitness.

J. UNGER.

REVIEWS

POWER POLITICS. By GEORG SCHWARZENBERGER. Jonathan Cape. pp. 448. **21s.**

Dr. Schwarzenberger is a copious thinker and writer. Still a young man, he has already many books and innumerable articles to his credite For some years he was the Secretary of the New Commonwealth Institute of World Affairs, and in that capacity devoted himself to the study of international relations and planning for a better order. This big book is the result of his collected wisdom. It examines the development, structure, and forces of the international system, and is described as an introduction to the study of international relations and post-war planning. It is divided into three principal parts—

(1) "Power politics," which gives an account of the development of the international society in mediaeval and modern times, with a keen analysis of the present weakness of international law.

(2) "Power politics in disguise," which gives an equally keen analysis of the failure of the League of Nations and the collective system established after the first world-war.

(3) "Utopias examined," which analyses the different patterns of a new order, the rights of man, the League reform, the Federal Scheme,

Dr. Schwarzenberger is a member of the realist school, of which E. H. Carr is the shining light. He brings, however, to his study a special character, a German method of theorising and thoroughness. Every statement must be analysed philosophically; and he retains the German preference for poly-syllabic words. He has read everything that has been written in recent years about international law and relations in the three principal European languages. Sometimes the reader may wish that he

had read less. For he overwhelms himself with quotations. Each page has its apparatus of learned notes, and each chapter has its apparatus of full bibliography. The layman who must thread his way through this maze of learning is left gasping. Two examples taken at random from the book may illustrate the treatment of the subject, and also the elaborateness of style. In the first he is speaking of the structure of the international society, and the lack of a true sense of world community; "In the case of entities which are organised as States, the alternative to the universal imperialism of one amongst them over the rest is a policy based on the principle of self-preservation and self-interest. It depends on the concrete situation whether armaments in themselves form an adequate protection against the everlasting threat of annihilation, whether such a policy has to be supplemented by alliances, possibly contributing to the formation of a balance of power system, or whether favourable opportunities and weakness on the part of other entities permit a more active and aggressive pursuit of the policy of national self-interest." In the second passage he is introducing the problem of international planning, for which, he says, research can fulfil a function by subjecting the different schemes to a transcendental and immanent criticism. "Transcendental criticism deals with the assumptions on which the plans are based. . . . Immanent criticism has as its object the working out of the shortcomings of plans from all possible points of view, but without challenge to the major assumptions on which the plans are based or which they take for granted. At a time when intellectuals not directly engaged in the effort to win the war have swung over from an extreme positivist situation-making, it seems apposite that at least a few concentrate on the not always pleasant task of reading the host of plans committed to patient paper, and digest the multitude of ingenious suggestions into a typology of patterns from which the makers of the coming peace and the bewildered citizens may take their choice."

It, however, Dr. Schwarzenberger's book is not easy reading, and is overloaded with learning and quotations, there can be no doubt about the thoroughness of the study or the clearness of the approach. The note on the cover of the book, that his keen and lucid intelligence is "a Virgil in this warring Inferno," may be an overstatement, because the reader is not always conscious of the tranquil mind of his guide. What, nevertheless, the book does expound convincingly is the hopelessness of founding a peaceful order unless there is a sense of world community and some effective sanction to international law, which is to regulate the relations of the community. Hitler's ruthless use of power has shown up all the weak spots. It has torpedoed, as it were, the old illusions. The jurists to-day, as well as the statesmen, recognise that the law must have a forcible sanction—if it is to be effective. The establishment of the League bodies for preserving the peace and of the Permanent Court of International Justice has not been adequate. The League lacked a true faith among its members; as De Madariaga put it, "It had too much church for its faith." The Permanent Court of International Justice at the Hague "suffered from a starvation process." It was not given the chance of dealing with the major issues which caused the conflict in Europe during the decade before the second world-war.

Dr. Schwarzenberger realises that the remedies which, in the years before the war, the New Commonwealth Institute particularly advocated, an international police force and an international tribunal of equity,

would not be enough. They too require a new order based on spiritual as well as political and economic factors before they can work.

In the analysis of the utopias which the visionaries and the realists have put forward, both before and during the war, Dr. Schwarzenberger does well to stress the need of radical change in the social forces of the world, which must accompany any federation of states. "The conception of political freedom is meaningless if it does not include the guarantees of minimum standards of social justice and security, matters which are beyond the individual, and which can only be achieved by conscious and organised efforts of political groups." His conclusion, indeed, is not very definite: "The only alternative to the chaos of another unimaginative peace is a policy of reconstruction, which is conscious of the inter-relationship between unemployment, national sovereignty, and war, and the answer to this challenge in social justice, democracy and international order." The post-war world must seek to attain that sense of community based on a common ethic which did mark, however imperfectly, the mediæival Christian order in Europe. The common faith must comprehend all the values which make a real community: justify freedom, truth and love, "and these are only leaves from the book of christianity. . . . Christian communities in which they have become reality, hold the key to victory and post-war reconstruction in their hands."

NORMAN BENTWICH.

JUVENILE DELINQUENTS GROWN UP. By SHELDON and ELEANOR GLUECK. New York, The Commonwealth Fund. London: Humphrey Milford, Oxford University Press, 1940. viii and 330 pp. **$2.50.** English price, **14s.**

Criminology—science or art? Although this old pseudo-problem is still alive, the controversy seems to have lost much of its former animosity, and even some of the most outspoken supporters of the "art" theory are becoming increasingly willing to admit that the artistic approach does not necessarily exclude the application of scientific methods. What is in fact meant by that alternative, and does it reveal a difficulty which is peculiar to the understanding and treatment of crime? "There is no anti-thesis between science and art," wrote a great modern lawyer whose interest in the criminal section of the law was very slight.[1] "Every true work of science is a work of art . . ." In a sense, this is true. What Ehrlich had in mind was the fact that receptivity of mind, imagination, "power to give shape to one's material," to create an original method and technique, are just as much indispensable for the genuine scientist as they are for the artist. This does not, however, entirely answer our opening question. Those who doubt the character of Criminology as a science may be prepared to admit that a given piece of criminological research shows those artistic qualities and is based upon an original method and technique. What they dispute is that even the most accomplished scientific research can substantially assist in the highly individualistic task of interpreting and treating the law-breaker. Those in particular who are themselves masters in the art of dealing with offenders may feel somewhat uneasy at the possibility

[1] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*. Translated by Walter L. Moll. Harvard University Press, 1936, p. 472.

that dry statistical tables may, some day, take the place of human sympathy and understanding. If the criminologist wants to overcome such residues of latent suspicion and antagonism he will have to do two things above all: First, to prove that, in his own person, he combines scientific knowledge with practical experience, sufficient to enable him to appreciate the actual problems of the judge, the administrator and the field-worker, and to be of real assistance to each of them; in short, to bridge the gap between theory and practice. Secondly, to draw attention to the fact that the process of transformation which is at present taking place in the field of Criminology and Penology is in no way peculiar to them, but has its counterpart in the sphere of Psychology, Education, and other branches of Social Science, all of which are equally concerned with the highly individualistic task of handling human material. Tentatively, one might perhaps refer to the somewhat analogous process in the realm of pure art to which Dr. C. H. Waddington in his recent Pelican book *The Scientific Attitude*, has devoted an attractive though slightly rambling chapter, "Art Looks to Science."

These brief remarks of a more general character seemed advisable to introduce a book of that somewhat uncompromising "pure science" type which may easily provoke renewed attacks on the part of the "art"-lovers. Since 1930, when they published their first volume in this remarkable series, the eminent criminologist of Harvard University and Mrs. Glueck have patiently added particle after particle to their unique system of follow-up studies and Prediction Tables. These studies are neither easy to digest nor particularly entertaining. Their austere statistical tables, dry interpretations and dispassionate conclusions are only seldom enlivened by detailed individual case histories or other digressions of psychological interest. They show the way how to meet the legitimate criticism (see M.L.R., Vol. V, pp. 150–52) of the deplorable deficiencies in the corresponding data available in this country. What we do know about the success or failure of our present ways of dealing with the law-breaker is largely limited to personal impressions and to some interesting but inadequate official statistics. To indicate some of the principal weaknesses of the existing statistical data: First, they are unsystematic, almost each of them using different classifications, which makes any comparison of the various sets of figures impossible. Secondly, they are merely statistics of re-appearances in Court which do not take into account the possibility that a particular offender may not have reappeared for reasons entirely unconnected with the success of the penal treatment received (as, for instance, death, emigration, residence in a penal or mental institution). Likewise, apart from the files of Probation Officers and After-care Organisations, no details of any kind are available which might indicate the causes of recidivism in individual cases.

The system of following-up as elaborated by the Gluecks tries to avoid such shortcomings by elucidating the after-histories of individual offenders and by correlating their subsequent behaviour to their antecedents as well as to the type of penal treatment received. The present book is a continuation of an earlier investigation, published in 1934 under the title *One Thousand Juvenile Delinquents*, which contained the results of a follow-up study of a thousand boy delinquents who had appeared before the Boston Juvenile Court during the years 1917 to 1922, when they were of an average age of thirteen and a half years. As these boys had been examined, at the request of the Court, in the Clinic of the Judge Baker Foundation, that

first study was concerned not only with the subsequent behaviour of the boys during a five years period following the completion of their treatment, but also with the degree of co-ordination between Court and Clinic. The present work deals with the careers of this group during two further five years periods, thus giving the story for no less than fifteen years after penal treatment, up to a point when the average age of the group was approximately twenty-nine. The task of locating these men and of obtaining accurate information about their doings without giving offence to them or to their families must have been formidable. Thanks to the elaborate technique evolved by the authors and their trained staff of field-investigators it was successfully solved in the great majority of cases. After eliminating sixty who had died before the end of the third period, and a further ninety-two whose behaviour could not be cleared up to the end, the authors were able to collect the information they wanted for 848 men of the original army of a thousand, which seems to be a highly satisfactory achievement. Roughly speaking, the information refers to certain factors in their general histories, to changes in their criminal behaviour and to the "peno-correctional" treatment which they received during the follow-up period. Out of the wealth of interesting results which have emerged from this study, at least a few major findings may be quoted. There is, first, the fact that the percentage of offenders who could be regarded as "reformed" increased from 15 at the end of the first five years to 26·8 at the end of the second, and to almost 40 at the end of the third five years period. Moreover, even among those who continued to commit crimes the percentage of serious offenders decreased from 75 to 47. What may have been the reasons for these changes in behaviour? Improved environmental conditions? Efficient "peno-correctional" treatment? Or simply settling down to normal life as a consequence of the process of growing older? Detailed comparisons between those who reformed and those who did not revealed that the former group, as was to be expected, enjoyed more favourable hereditary and environmental conditions. These differences, however, though significant, did not seem in themselves sufficient to explain the contrast in behaviour, and an additional explanation had therefore to be sought. Already in their previous study *Later Criminal Careers* (1937), which described the after- histories of 500 adult male offenders, the authors stressed the predominant importance of the simple process of ageing. Up to the age of thirty-five at least, maturation was found to be the strongest reformative factor, whereas those who had not reformed by then were much less likely to do so thereafter. This process of maturing, it was found, could be assisted and even accelerated by favourable environmental changes, and vice versa, whereas the various forms of mental instability proved the most formidable obstacle to reform. In the present volume this theory has undergone an interesting modification. The new material would seem to indicate that the cessation of criminal activities is related less to the arrival at a specific chronological age than to the distance from the onset of a criminal career. In this view the authors were confirmed by the results of a comparison of the group dealt with in the present volume and the group studied in *Later Criminal Careers*. In this comparison "two series of offenders, quite different in make-up and background and significantly different in the fact that one began to be delinquent (on the average) five years before the other, have been shown to resemble each other strikingly in conduct, *not at similar ages, but rather at a similar distance removed from the time they began to be*

delinquent. This would seem to indicate that what may be called, after Quételet, the 'propensity to criminality' has a more or less definite life span regardless of the age at which delinquent behaviour actually begins." (p. 105.) This theory may seem to be at variance with the traditional view that delinquent tendencies which show themselves in early youth are usually symptomatic of some deep-rooted trouble and more difficult to cure than delinquent behaviour occurring during the later stages of adolescence. This latter view is, by the way, confirmed by one of the statistical tables in the present book, which the authors themselves interpret as indicating that "impulses to misconduct that are likely to persist manifest themselves early in antisocial or otherwise abnormal reactions to school life . . . where maladjustment known as 'delinquency' begins early in life it is rooted more deeply . . . and more probably is related to the hereditary, biologic make-up of the individual than in cases where it does not begin to manifest itself until the adolescent years" (p. 114). On the other hand, the present reviewer may be permitted to quote his own finding that "amongst the men who commenced their criminal activities after the age of forty there are comparatively many who at that late stage have become habituals with twenty or more convictions" (*Social Aspects of Crime*, p. 359). In short, the evidence hitherto available is too limited in scope and too conflicting to justify a final verdict. The authors can be relied upon, however, to check their discovery with their usual thoroughness.

Special attention is given to the nature and length of the peno-correctional treatment received by the group over the whole period, to the changes in penal methods, and to the behaviour of individual offenders during and after the various forms of treatment. One of the results emerging from this part of the study is the higher percentage of adjustment and success achieved by institutional treatment (Prisons, Reformatories) as compared with non-institutional methods (Probation, Parole, Foster-home placement). It may be worth remembering that similar results were obtained by corresponding investigations published by the Home Office in *Criminal Statistics* (for 1932 and 1938). In both cases, however, it would be much too early for the supporters of Probation and similar non-institutional methods to accept defeat, and the authors themselves emphasise that much more detailed research into the working of the various methods of treatment is necessary, research which, as we are glad to hear, is already beginning. Nevertheless, even from the present study certain associations between personality types and the prospects of the various methods of treatment seem to emerge. It was found, for instance, that offenders of the solitary type responded better to Probation than to institutional treatment, whereas the opposite was true of offenders with deep-rooted feelings of insecurity created by their early environment.

The numerous correlationships worked out between the personalities and environment of the offenders and their behaviour during and after peno-correctional treatment could be used for the construction of *Prediction Tables*. Ever since the publication of the earliest Glueck studies and the almost simultaneous investigations of Burgess, Vold, Monachesi and others, American penologists have realised the great practical significance of their work for the administration of criminal justice. As a consequence much time and thought have been devoted to the working out and improvement of predictive devices intended to assist the Courts in their task of finding the most suitable methods of treatment. The idea itself is simple

enough and must appear convincing to anybody except the most extreme representative of the "pure art" theory. If we know the individual and environmental conditions and the behaviour of a large body of offenders over a considerable span of time, we are able to select those conditions which are most frequently related to certain types of behaviour and can devise Prediction Tables of a fairly general applicability. In the present study, out of sixty-three factors in the family and personal history of the delinquents and their behaviour during each particular form of treatment five factors which showed the highest symptomatic value and about which information could be most easily obtained (birthplace of father, discipline by father, discipline by mother, school retardation, school misconduct) were chosen, for instance, in order to construct a Prediction Table for the likely behaviour of an offender during "straight Probation." Other factors showed the highest predictive value for institutional methods of treatment. In all, eleven different Prediction Tables had to be constructed. The total number of factors employed is, however, not large, since some of them could be used in several tables. The authors claim, therefore, that the collection of the necessary information would not require more time than is at present needed for the usual report of a Probation Officer, and that on the basis of this information each offender could be scored in a few minutes, which may seem somewhat over-optimistic. In a special chapter it is shown how the Courts had actually dealt with certain offenders and how differently they might have been treated according to the Prediction Tables. In order to avoid possible misconceptions it should be mentioned, however, that the authors are particularly anxious to make it clear that their Tables are in no way intended to be used as the only basis of the sentencing policy of the Courts. "A prediction table is, after all, only an instrument for the court's use, but it has, at least, a rational foundation, and is not the result of vague notions about the presumably deterrent effect of this or that form of punishment, or a whim of the moment on the part of some judge, based on largely irrelevant but seemingly significant considerations—not to speak of pressure on the court for leniency or severity in a given case" (p. 217), and "If the business of criminal justice is to be a scientific work of segregating the incurable and, as early as possible, reforming and rehabilitating those offenders who are capable of entering legitimately upon life in society, the attitude of those who carry on the affairs of justice must be that of scientists, not of persons who see the criminal simply in terms of 'leniency' and 'severity' of punishment. And a 'scientific attitude' without requisite equipment in the biologic and social sciences is of little value" (p. 273).

Sceptics may be inclined to say that, after all, every criminal Court, as a matter of course, pays attention to those factors upon which the Prediction Tables are based. They overlook the fundamental differences between casual, unsystematic, and unchecked personal observations and the accomplished machinery envisaged by the Gluecks. On the other hand, even those who unhesitatingly accept the need for more rational and scientific methods may have to admit that, in spite of the admirable pioneer work done by the authors, the factual material at their disposal does not yet seem throughout adequate. Their samples are still too small to be regarded as truly representative, and similar considerations apply to the facts upon which their judgment of success or failure of the various methods of treatment depends. Whether an individual offender will respond to Probation rather than to one of the different types of institu-

tional treatment can sometimes not be finally decided on the basis of one or even two experiments with these methods, because of the decisive influence of personal factors. Where one Probation Officer fails another may succeed. However, these are difficulties of which the authors themselves are no doubt fully aware (see, for instance, pp. 149–50), and which can in no way detract from the potential value of their work. The more clearly we realize these potentialities for the future administration of criminal justice the stronger will be our desire to see similar studies one day undertaken in this country. That the methods and results of the authors will be applicable outside the U.S.A. only with certain modifications goes without saying.

HERMANN MANNHEIM.

THE INTERNATIONAL LAW OF JOHN MARSHALL. A Study of First Principles. By BENJAMIN MUNN ZIEGLER. Chapel Hill, The University of North Carolina Press, 1939. Price, **$3.50.**

There has probably never been a judge whose contribution towards the development of international law was greater than that of Chief Justice Marshall. During Marshall's term of office (1801–1835) the young Republic of the United States was confronted with many problems affecting international relations. The Revolutionary and Napoleonic Wars, the struggle of the Spanish and Portuguese provinces in South America for independence, the African Slave Trade, piracy, and other matters led to an unique opportunity of establishing the legal rules which the American nation was to follow and defend in years to come, an opportunity which Marshall used to the greatest advantage: Of the 1,215 cases decided by the Supreme Court during his term, 195 involved questions of international law, and in 80 of them he delivered the opinion of the Court. Although international lawyers have always been aware of the debt they owe to Marshall's creative genius, Professor Ziegler may justly claim to be the first who adequately acknowledges it. His interesting and useful book is almost a treatise of international law based on Marshall's decisions. He shows that there is hardly any topic of international law capable of discussion in a municipal Court which has not been dealt with and influenced by Marshall. Professor Ziegler has now compiled a collection of these pronouncements in an attractive manner and thus provided ready access to one of the chief sources of modern international law.

F. A. M.

IMPOSSIBILITY OF PERFORMANCE. By R. G. MCELROY, edited by GLANVILLE WILLIAMS. pp. xl and 255. Cambridge, at the University Press. Price **15s.** net.

I very much enjoyed reading this book. Its theses are well and closely argued; the author stands squarely for the positions which he has taken up; and he is quite ready to cross swords with law lords of the highest eminence. The result is a very stimulating piece of work. Actually I am not persuaded by his main argument which is based on a rigid sanctity of contract thesis, but one cannot but respect the fine common law tradition which inspires it and which would certainly have appealed to lawyers of the school of Parke, B.

Dr. McElroy has also been fortunate in having the collaboration of Dr. Glanville Williams who is directly responsible for a substantial part

of the volume, and has clearly influenced the argument over much of the remainder. It seems however that they are not in agreement on all points —see the interesting footnote at p. 391.

Dr. McElroy is not so much concerned to give an exposition of the law of impossibility of performance, though his book is more than adequate as such, as to analyse the bases upon which the law relating to this subject has been built up. In doing this he has focused attention upon the close connection which exists, or should exist, between impossibility of performance and failure of consideration, and in this, thinks Dr. Glanville Williams, lies his principal contribution to the jurisprudence of the subject. Where there is impossibility of performance it is usually the promisee who has a grievance and who brings proceedings for breach of contract. The Court is usually therefore concerned with the question of whether the promisor is excused. There has only seldom been any question of the promisor claiming to enforce the obligation, and in such cases—the Coronation series are of course the best known—the Courts have, perhaps naturally, tended to apply the same sort of considerations as those by which they have decided actions by the promisee, and have looked at the case from the point of view of impossibility of performance.

Dr. McElroy's view is that such cases can and ought to be dealt with quite shortly on the failure of consideration principle, and he shows that the Courts were in the process of applying the principle until in the Coronation cases they went off the rails. With the assistance of Dr. Glanville Williams he has developed this thesis at some length in the two articles which have already appeared in this Review (vol. iv, p. 241 and vol. v, p. 1) and it is perhaps unnecessary to say more here than that the tide has set so strongly against this thesis, attractive though it is, that it may be doubted whether even the House of Lords can turn the flow.

Dr. McElroy's other principal topic for discussion is the distinction which he draws between the *Taylor* v. *Caldwell* type of impossibility and the frustration type. The third type which arises from illegality is comparatively simple. The principal problem in *Taylor* v. *Caldwell* to which Dr. McElroy very reasonably equates the cases depending on death and disablement of the promisor is that of whether the implied term in the contract which in the given circumstances brings about its dissolution is to be regarded as a genuine reconstruction of the intention of the parties, or whether it is implied only as a result of a legal fiction. He argues very powerfully in support of the latter view and marshals the dicta in support of it. It must be confessed, however, that many of the judges who have used this phrase do not seem to have reflected very seriously as to what they meant by it and it is not possible to regard the matter as settled.[1]

On the other hand Dr. McElroy regards the cases commonly referred to under the head of commercial frustration as depending upon a term implied from the intention of the parties according to the ordinary rule in the *Moorcock*, (1882) 14 P.D. 64. He shows that all the early cases under this head are carriage contracts where there was inordinate delay which frustrated the adventure.[2] These were all cases where the promisor's promise of performance was limited by express exceptions; such as

[1] See my note on *Constantine S.S. Line* v. *Imperial Smelting Corporation*, [1941] 2 All.E.R. 45 in Vol. V, p. 141 of this Review.

[2] He argues that commercial frustration is properly confined to cases of inordinate delay. Historically the doctrine no doubt originated in delay, but to deny it any further growth seems to me altogether foreign to the spirit of the law.

"perils of the seas," and it was considered necessary to imply a term that if the performance was unduly delayed by reason of such exception it should no longer be obligatory. He even argues that in a "straight" contract without exceptions it is not possible to imply any term of the sort, since the parties must be presumed to have intended that the promise should be performed at all events. There may be some justification for this view in the earlier cases, but the whole tendency of the present century is against it, and Dr. McElroy is forced to admit that the weight of the dicta in the House of Lords is against his view.

The cases decided during the last war, of course, went most, if not the whole, of the way to establishing that impossibility of performance rests on a common basis whatever the cause which induces it. It is a more likely reading of these cases that the law lords were deliberately seeking to establish the common basis than that they were unable to understand *Jackson* v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125. Dr. McElroy's view of the law is indeed founded upon a static, rigid conception of sanctity of contract, and it is not easy to see how it can survive the recent decision in *Constantine S.S. Line* v. *Imperial Smelting Corporation*, [1941] 2 All.E.R. 165.

Although it is almost equally difficult to support on the case there is much more to be said in favour of Dr. McElroy's contention that supervening impossibility should not be regarded as *ipso facto* terminating the contract. Where there is illegality or physical destruction this must no doubt be so, but in the commercial frustration type of case there is a great deal to be said on practical grounds for regarding the impossibility as giving a right to avoid rather than as affecting an avoidance. It may occasionally happen that the promisee wishes to have the contract performed, as indeed happened in *Tamplin's Case*, [1916] 2 A.C. 397 and there is much to be said for allowing him to have it—one suspects indeed that it was a feeling that it would be just to allow the charterer to have performance which led to the decision in *Tamplin's Case*. i.e. that there was in fact no frustration. Here again however the argument is all but concluded by weighty dicta of very eminent law lords, as Lord Sumner in *Bank Line* v. *Capel*, [1919] A.C. 435 at p. 458.

The above are some of the more interesting topics which Drs. McElroy and Glanville Williams discuss, but they are naturally far from exhausting the whole range of their work.

A few points of detail may be referred to. At p. 26 Dr. McElroy falls into the error of equating delivery with the passing of the property under a contract for the sale of goods. It is elementary that the property on a contract for the sale of specific goods usually passes at the time of the contract, and if the goods perish before the time for delivery the loss falls on the buyer. S. 7 of the Sale of Goods Act, 1893, deals only with the less common case where the risk does not pass to the buyer at the time the contract is made.

On p. 193 appears the statement "the amount of demurrage which the shipowner would have to pay"—shipowner is presumably a slip for charterer.

R. S. T. C.

THE PATTERN OF COMPETITION. By WALTON H. HAMILTON. Columbia University Press: Humphrey Milford (English Publishers). **8s. 6d.**

This book is one of a series published by the Department of Economics of Columbia University in which distinguished American scholars have

attempted to summarise the recent work in their respective fields. *The Pattern of Competition* is addressed primarily to the general reader; the economist will be mainly interested in the potentialities of the legal system in reinforcing economic "laws," whilst the lawyer will perhaps be chiefly concerned with the complexities and intricacies of the economic pattern with which he is expected to deal.

Professor Hamilton explains in his preface that his "intent is to reveal something of how competition operates and the difficulties which its regulation is up against." The first section of his book could not easily be improved upon. Concisely and convincingly he gives us the outline of the historical development of the competitive system: "A culmination of countless expediencies" which grew up in response to the changing technique of production. As the division of labour increased and factory industry became more general, market prices were seen to be the natural regulators of the national economy. On this basis there was formulated an economic theory of "a competitive order of economic forces acting of themselves and by themselves." On the same basis competition was equipped with a legal superstructure involving the sanctity of private property, liberty of contract, the pursuit of gain and freedom of trade. For a time social practices moved to the pattern of economic theory but the theorists had apparently overlooked the dynamics of social development and soon their symmetry bore little resemblance to economic reality.

The second and longest section of the book is devoted to a more descriptive treatment of the way in which particular industries[1] have deviated from the straight and narrow path of competition. Professor Hamilton presents no general system labelled "imperfect competition," but is concerned with the actualities of the industrial structure of modern society. Historical circumstances and the technical conditions of supply or demand have determined the final form of a nation's industries. The dictates of fashion (i.e. the peculiarities of demand) have prevented the standardisation and capitalisation of the dress industry. Cotton seed, involving joint products, has evolved its own unique economic structure and the possibilities of vertical integration in the milk industry have "almost obliterated the competitive pattern." Reality is neither black nor white, neither purely competitive nor wholly monopolistic. "The tightest of trades has its zones of competition; a widely competitive industry may have its points of constriction."

It is not perhaps in itself important that reality should have become so different from the abstract pattern. What is significant is that it is the consequences of competition which provide the social, moral and economic justification for private property, liberty of contract and freedom of trade. It is under competitive conditions that scarce means are distributed between alternative ends so as to maximise satisfaction—that, at least, is the contention of the orthodox economist. For this reason irregularities in the competitive system are not socially beneficial.

The dangers of this situation were appreciated by American society in the last decades of the nineteenth century and Professor Hamilton devotes his third section to an examination of the attempts made by Congress to use legal methods to restore "the pattern of competition." The law was obviously uncomfortable in strange surroundings. Only slowly did the Sherman Act recover from the paralysis with which it was

[1] Professor Hamilton writes of American industry but his remarks are not irrelevant to the conditions in this country during the last half-century.

born. Congress passed the anti-trust laws but was unaware of the gravity of the economic malady from which society suffered and the law could not perform the major operation that was called for with the 100,000 dollars which was all it was given. The sad and well-known tale of the working of the Sherman Act is retold with considerable pungency. A legal attack prompted a legal defence. The Trust became a "gentlemen's agreement," and the Trade Unionist, being no gentleman, bore the brunt of the legal onslaught.

The most interesting, the most constructive, and the only really controversial portion of Professor Hamilton's book is compressed into the fifteen pages of the final section. The irregularities of the competitive pattern have been illustrated and the failure of the intervention of the law admitted: The author is now concerned to investigate whether in fact it is not possible to make more effective use of the legal system.

We agree, of course, that any anti-trust movement should be adequately financed and adequately informed and we concede that to make the restraint of trade a "wrong against the national economy" instead of a "crime against the state" would seem appropriate. More dubious is the suggestion for raising the penalties for breach of the law. Professor Hamilton does not, however, make it clear whether anti-trust is to be a movement in which the resources of the law are to assist in maintaining the competitive pattern, with the willing co-operation of business men, against the inherent tendency of modern industry towards monopoly or whether legal machinery is to be used to deter and punish those who wittingly filch monopoly profits from the wealth of society. Presumably any anti-trust movement should do both, but the legal machinery required for undertaking two such different tasks could hardly be the same. And if, in the first case the technical conditions of modern industry do tend towards combination and integration we wonder whether the law can ever force industry to conform to the competitive pattern and, in the second case, if individuals are intent on private gain at the public expense and if the possibilities of so acting exist, we wonder whether it is within the powers of heaven or earth or the law to stop them.

The Pattern of Competition reads well, but it is nevertheless a depressing book. For this the author is not entirely to blame. It was written presumably in the Spring or Summer of 1940, when America was busily engaged in buying her way out of the war and when the fall of France had only recently served to withdraw the word "phoney" from the vocabulary of the European commentator. In the months that have since elapsed the eyes of layman and specialist alike (in this country and we suspect in America also) have turned to broader horizons. It is depressing to be brought back to the narrow compass with which Professor Hamilton is concerned; to contemplate that when the guns cease to fire the Allied Nations must busy themselves with the creation of a legal apparatus to support an economy which seems patently unsuited to the technical conditions of twentieth century industry and which for too long has been associated with poverty and overproduction, unemployment and overwork.

It has, of course, occurred to Professor Hamilton that competition may be an interlude—"a lull between ages of unlike authority" as he chooses to put it—but he is not anxious to bury the body. Rather with the aid of the lawyer he is concerned to squeeze from it the last drop of blood. Considering the sordid nature of his task, he performs it with considerable elegance and dexterity.

JOAN FREEMAN.

A PRACTICAL EPITOME OF THE DEATH DUTIES. By David Harrison, LL.D., *of the Estate Duty Office, London.* Sweet & Maxwell, Ltd. pp. xxviii and 348 (Ind. 45). **21s.** net.

This admirable work is intended for the busy practitioner, for whom indeed it is specifically written; it is emphatically not a work for students, who will find *Death Duties for Students*, reviewed at 3 M.L.R. 254, more within their mental reach. The law relating to Death Duties is at once the most abstruse, recondite and intricate of our revenue laws, not only by reason of the very nature of the subject but also because, unlike the other main tax under the charge of the Commissioners of Inland Revenue —the Income Tax—there has been no Consolidation Act, and the statutory law on the subject has to be extracted from a long series of Finance Acts dating back half a century to that of 1894, as regards Estate Duty, and a hundred years earlier to the Legacy Duty Act, 1796, as respects that duty. The writer of a book, legal or otherwise, cannot legitimately be criticised for not doing what he has deliberately not set out to do, e.g. in Dr. Harrison's case, to abstain from setting out the sections of the relevant statutes *in extenso*. The more important sections are, however, quoted *verbatim* in the text where they seem in point, but to the reviewer it seems that this ill accords with the method that the learned author has adopted in dealing with his subject, viz. that of the narrative text. Where this method is adopted, it seems preferable to set out the whole of the statutory law at the end of the text or, if considerations of space are paramount, to set out there those sections it is desired to quote verbatim—referring the reader thereto by footnotes in the text; an excellent example of how this would work is to be found in Konstam's *The Law of Income Tax*.

The work is clearly that of an expert, as is only to be expected from Dr. Harrison's official position, though he makes it clear that the views expressed are not "official." His endeavour, and a not unsuccessful one, has been to eschew all detail as much as possible and to concentrate on the main principles of the various duties and their practical application. The work comprises the three cognate duties, Estate Duty, Legacy Duty, and Succession Duty, and it is in regard to the first-named that one misses most the setting-out of the whole of the relevant part of the Finance Act, 1894, which is still the keystone of the Estate Duty.

The work is roughly divided into two main parts, one dealing with Estate Duty and the other with the Legacy and Succession Duties: the former part is subdivided into six chapters which deal with "Property Passing and Benefits Arising," "Exemptions, Reliefs, etc.," "Rates of Duty," "Valuation, Assessment, etc., of Property," "Accountable Persons" and "Certificates"; the learned author is particularly to be commended upon the clarity with which he has dealt with the topics comprised in the first two chapters. Throughout the work, he has admirably interwoven into his text references to, and quotations from, case law. In dealing, however, with recent decisions on the operation of Estate Duty on discretionary trusts, viz. *Scott* v. *Inland Revenue* [1937], A.C. 174, and *Burrell* v. *Attorney-General* [1937] A.C. 280, one would have appreciated a reference to the excellent note on these two cases at 53 L.Q.R. 267/8.

In conclusion, Dr. Harrison must be congratulated on a very full and informative index, the absence of which so often mars the value of similar works for the busy practitioner—who will be well advised to add this book to his library.

A. Farnsworth.

THE PRISON COMMUNITY. By DONALD CLEMMER. The Christopher Publishing House, Boston, U.S.A., 1940. Pp. xi and 341. Price, **$4.00.**

The author of this book is a sociologist who was employed as such for nearly a decade in a large prison in the State of Illinois, a prison which he regards as fairly typical of American penal institutions—the "Middletown" of American prisons, or "just another place where men do time." The book itself, however, is definitely *not* "just another book about prisons." It represents a new type. Up to now, we have had books on prison administration and prison life written either by ex-prisoners or prison officials, giving nothing but their personal views, or by outsiders with such limited knowledge of the subject as can be gained by occasional brief visits. This is perhaps the first attempt on the part of a trained observer with a long and intimate first-hand experience to study prison life under sociological aspects, i.e. to analyse the "culture," the social structure and the social relationships within the prison community. To judge from his methodological account, the author seems admirably equipped for his task, especially as his duties were not confined to the sociological side but included psychological work such as intelligence testing and many activities which brought him in close contact with every aspect of prison life. Years of experience in two other penal institutions and continued observation of discharged inmates provided additional insight. Of special value is the inclusion of a considerable number of essays, letters, and answers to questionnaires by the inmates themselves. The idea that prison has its social organisation, quite independent of its official administration, is by no means new. It was, in fact, expressed fifty years ago by Raymond Saleilles and has been stressed by most of our ex-prisoner authors, but it was left to Mr. Clemmer to study it on scientific lines.

Clearly, the effect of imprisonment on the social behaviour of the inmates cannot be examined without adequate knowledge of their previous social histories. In his introductory chapters the author describes in detail the districts from where most of the 2,300 inmates come, age, race, nationality, physique, intelligence, occupational and marital status, previous convictions and the crimes for which they were sent to the institution. The data given are, generally speaking, in accord with the existing body of information on the characteristics of the American criminal. Those who may, at first, feel shocked at the high rate of mental deficiency (21·2 per cent below an I.Q. of 70) will soon arrive at a more balanced interpretation when they learn that the figure for the army draft was almost the same. There is the usual high percentage of individuals from broken homes, and the author, without offering an opinion as to the significance of the broken home as a causative factor in crime, definitely asserts that the resulting lack of family ties greatly affects the "prison culture." There follows a description of the prison itself which shows at least some of the characteristics of an American "maximum security prison," as machine guns, tear and gas grenades, etc. The warden is appointed on a purely political basis, and most of the other members of the staff, too, reach their positions through political channels, in other words, an "unbridled spoils system" is in force. As the author explains, this system seems to have done a lot of good in the years 1932–33 when, as a consequence of the economic depression, many young and efficient men could be appointed in

place of the old type of job-holder who under a different system would have been irremovable. The prisoners' reactions to this method of appointment can be gathered from a remark in an inmate's essay on the work of the prison chaplain: "His job is political, and like all political appointees he 'passes the buck' to the other man who usually passes it on to the next." The author recognises, however, that besides the political one there are many other staff problems that have to be faced. "The personality problems of employees in prison may be quite as serious as those of the inmates. . . . For the betterment of society both need to be controlled." The training which these "prison guards" receive seems entirely inadequate. No wonder, then, that "less than five per cent of the employees ever consider the reformative aspect." Another distinctly bad feature is the overcrowding which necessitates the keeping of two prisoners is one cell, and this in an institution where the number of sexually abnormal or "quasi-abnormal" men is estimated at 40 per cent (p. 257). In a chapter on "Sexual Patterns in the Prison Culture" the effect of this system on individual inmates is clearly shown.

The prison receives men with fixed as well as men with indeterminate sentences, an important point to which perhaps too little attention is paid by the author. It might have been particularly revealing to collect some systematic observations on the effect of indeterminate sentences on the minds and behaviour of inmates; instead, we are allowed only a few occasional glimpses in this direction.

The central theme of the book is that "prison is a highly complex community in which the social processes, to an extent, vary with those found in a free community." This theme is discussed in a number of chapters on social relations, social groups, leadership phenomena, social controls, social implications of work and leisure. That criminals and prisoners are just as class-conscious as any other social group and show similar stratifications is well-known. There is hardly a single writer on these subjects who would fail to point out that professional thieves do not mix with amateurs or sexual offenders. Our author distinguishes the élite, the middle class and the "hoosiers," he admits, however, that the resulting social stratification is neither very strict nor very conscious. More important than this class division, and in fact second in importance only to the cleavage between officers and inmates, is the formation of social groups in prison, and it was the author's special aim to ascertain whether in a community of this kind the formation of primary groups is possible, i.e. of groups showing a highly integrated person to person relationship. To quote a few of his findings, it appeared that 18 per cent of the inmates belonged to such primary and another 40 per cent to "semi-primary" groups, that with increasing length of stay in prison the desire to belong to a group tended to weaken, and that serious and highly "criminalistic" offenders were more inclined to join a group than men imprisoned for either very trivial or very serious offences. An investigation of the leadership phenomenon showed that the type of leader to be found in prison differed from the leader type in free communities. None of the "leaders" of these groups had, before their incarceration, been leaders in any kind of organisation other than of a criminal character. On the other hand, to quote a remark by an inmate: "Would any of these men (*sc.* historical heroes: Napoleon, Alexander, Washington, Cromwell) be recognised as a leader in one of our modern prisons? I think not. . . . The average prison leader has no vision, little wisdom, an insatiable desire for notoriety,

enlarged adrenal glands and only a trace of thyroids." No expert statement is made about Hitler's prospects of becoming a recognised leader in an American prison community. Social ideals and purposes do exist among prisoners, but they are often different from those outside. That society and its representatives are the prisoner's natural enemies and that no prisoner should ever be helpful to an officer or talk to him, except on business, is an essential part of the unwritten Prison Code built up by generations of law-breakers. Again, this is common knowledge, but the author shows the considerable differences in responding to the Code that exist in actual practice, differences due partly to the conflict between the contents of the Code and previous standards of behaviour and partly to the fact that many prisoners are unable to be faithful even to their own Code. In prison, there is "no consensus for a common goal," which helps to explain why prison riots are not much more frequent. Among the prisoners consulted by the author there was no unanimity, for instance, on such questions as whether stealing from inmates, which is of course strictly prohibited by the Code, was in fact of frequent occurrence. To make the confusion still worse, some rules of the Prison Code are rather complicated. It is allowed, for instance, to steal state property in prison, not, however, to sell the stolen articles.

Although the author states that in this prison idleness has not been so widespread as in other American prisons he admits that there has not been enough work to go round and that in important workshops the men are idle between 50 and 60 per cent of the time. He is, however, not particularly concerned about this state of affairs and the consequent lack of vocational training as—contrary to the predominant view—he does not believe in the reformative value of prison labour. Much more important is, in his opinion, the question of how the prisoner spends his leisure: "One of the big problems in the future of America, as technocracy increases, will be the problem of leisure time. If we can teach our inmates enjoyable and socialised methods of spending their leisure time, it is possible that, as new values replace the old, ex-convicts will less frequently engage in crime. As for work placement in this machine age, we must inculcate a doctrine in prisoners that most of them cannot expect to be highly successful as workers. . . . Most of them must be taught that their basic satisfactions in life are not to be found in the field of work, but in the field of leisure-time activities. . . ." Surely, this is a rather unconventional theory with which many prison administrators will disagree, but it is worthy of serious consideration. It might even help to overcome the old fear, reiterated by recent writers, that educational progress will necessarily lead to a still more intense feeling of frustration among the masses for whom not enough skilled work will be available.[1] At present, as the author shows in an instructive but rather depressing chapter on "The Social Implications of Leisure Time," leisure-time facilities are still sadly inadequate in this prison. Efforts to improve them must of course be seriously handicapped by the evil "leisure-time heritages" which the prisoners carry with them. The author calculates that "leisure-time" occupies about 44 per cent of the prisoners' waking hours and that only 4 per cent of the total spare time is spent in "collective recreation." The latter is mainly of the "spectatoritis" type only too common in English prisons as well, "twenty men participate and the other 2,300 sit down

[1] See the review of Mr. Rhodes' "The Criminals We Deserve," in 3 *M.L.R.* 84.

and look on." Equally gloomy is the account given of the state of the prison library; by comparison, English prisons seem to be distinctly superior in this respect. The prison school, as usual in U.S.A., has its special superintendent and inmate teachers, the English system of using the services of honorary teachers from outside being unknown. The ideal might be a combination of both systems.

In the final chapter an attempt is made to assess the extent of assimilation or "prisonisation" that takes place among inmates, partly by drawing up a scheme of factors favouring such a process and partly by giving the histories of a number of prisoners. Nothing seems to be more conducive to high-grade prisonisation than the loss of outside contacts and the imposition of a very long sentence. The whole question is of practical significance because those who show a high degree of prisonisation are, as a rule, most likely to return to crime. Among the hundreds of prisoners with whom the author had become closely acquainted those who reformed were either men who should never have been sent to prison at all or men whose prisonisation had been only very slight. There are, however, some exceptional individuals with long sentences who undergo a "cycle of prisonisation," experiencing a peak period during the intermediate stage of their term but recovering towards the end by extricating themselves from the harmful effect of group ties, by taking up new studies and making plans for a new life. This is not the place for a detailed comparison between the author's scheme of predictability, based upon the conception of prisonisation, and that used by the Glueck's, to which reference is made in another review.

Simultaneously with Mr. Clemmer's study a fascinating book was published in this country, written by a man who had just served more than twelve years in English prisons on a life sentence. The writer, Jim Phelan, an intelligent observer and gifted novelist, suffers from an exceptionally strong contempt for "penologists," and an equally profound respect for "psychologists." His obsession prevents him from realising that these two may occasionally be identical. How he would classify the author of *The Prison Community* is difficult to guess. One cannot, however, overlook the close harmony which exists between many of his findings and those of the American investigator. Space forbids to prove this in detail. All we can do is to express our satisfaction that modern penology, this strange "'science' with no foundation of facts," this "quasi-science which is unknown and uncategorized, e.g. in the British Museum Library," which is produced by men who "do not even begin to comprehend a few elementary things about jails," somehow contrives to obtain accurate results which bear out the statements of men with first-hand experience of prison life.

HERMANN MANNHEIM.

SOLVING LABOUR PROBLEMS IN AUSTRALIA. By ORWELL DE R. FOENANDER, LL.M. Introduction by PROFESSOR D. B. COPLAND. Melbourne University Press. London: Humphrey Milford. 1941. xxxv and 168 pp. **15s.** net.

Australia has been a fruitful field for economic experiment, particularly in the sphere of industrial relations.

Mr. Foenander has already given us in his *Toward Industrial Peace in Australia* (reviewed by Julius Stone in 2 the MODERN LAW REVIEW, 249) an account of the service rendered by the Commonwealth Court of Conciliation and Arbitration. The present volume can best be considered as

a companion to his earlier work and consists of a series of essays bringing the position up to date.

Emphasis is laid on the fact that the Court is something more than an industrial tribunal. Actually it fulfils the function of an agent of economic control and, as such, has assumed a position of increasing importance in the economic system of Australia. This is due to the fact that although "legal problems have tended to become less important, economic problems have become more important."

The practical aspects of the work of the Court in the sphere of industrial relations are illustrated by reference to the pastoral and coal mining industries, both of which occupy important places in the economy of Australia. The author uses each of these two industries to illustrate the methods adopted by the Court in dealing with a single industry but in actual practice it would appear that the final decision of the Court is arrived at by considering many factors, e.g. the special capacity of the industry to pay rates above the basic rates: the detailed problems of fixing wages for the different grades of workers within the industry.

The book is carefully written and is invaluable to the students of industrial relations. This value is derived from the detailed description of the subject, and from the many suggestions as to the lines along which further study could be profitably undertaken.

However, there are several matters with which he does not deal adequately. In any legal system in which judicial interpretation plays a fundamental part one of the functions of the judge is to select from several judicial precedents that which is most apposite to the case under consideration and on this selection he will base his ultimate decision. It is appreciated that in this selection both the social background and the social philosophy of the judge must have a determining influence. How much more vital then are these influences on the judges of an Industrial Court the decisions of whom will affect directly the lives of (numerically) the most important class in any community? Thus in connection with the Commonwealth Court of Conciliation and Arbitration of Australia, some mention of the social background and the social philosophy of the judges would prove invaluable in appreciating the true significance of their decisions. It might be argued that such information would be difficult to present but it cannot be denied that its inclusion could not be logically avoided in any work dealing with such an important legal and social institution.

A. H. Thomas.

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